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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN KIMERY,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Double Jeopardy Clause bars parallel civil forfeiture and criminal actions.

2. Whether a civil forfeiture and a criminal prosecution constitute double jeopardy under the *Blockburger* test.

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Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Illinois.

OPINION BELOW

The Supreme Court of Illinois issued its opinion in this case on January 18, 1996. The opinion in this case is not yet reported. In its decision, the court determined that the civil forfeiture of John Kimery's vehicle constituted

"punishment" for double jeopardy purposes, that the civil forfeiture of John Kimery's vehicle and the criminal prosecution against him constituted punishments for the same offense, and that the civil forfeiture and criminal prosecution were separate proceedings. The court thus concluded that the trial court erred in denying Kimery's motion to dismiss the criminal charge against him on double jeopardy grounds.

The Supreme Court of Illinois accordingly affirmed the decision of the Illinois Appellate Court, which had reversed the trial court's order denying Kimery's motion to dismiss criminal charges. The decision of the Appellate Court was entered as an order pursuant to Illincis Supreme Court Rule 23. (*In re P.S., a Minor, et al*, Nos. 2-93-1050 and 2-93-1212 (Rule 23 Order entered March 1, 1995)). Copies of the Appellate Court decision, its order denying rehearing, and the opinion of the Supreme Court of Illinois are included in the appendix to this Petition.

JURISDICTION OF THE COURT

The opinion of the Supreme Court of Illinois, affirming the decision of the Appellate Court of Illinois and reversing the order of the Circuit Court, was issued January 18, 1996. This Petition is filed within ninety days of that opinion.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), since in the proceedings in the state courts of Illinois the respondent has asserted an alleged violation of his rights arising under the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

As the procedural history of this matter is convoluted, a brief summary is provided. The case originated as four separate appeals by defendants Turner, Towns and Kimery and P.S., a minor. For purposes of decision, the Appellate Court of Illinois consolidated the four appeals into two. In its first decision, involving defendants Towns and Turner, the Appellate Court held that defendant Towns had not suffered a double jeopardy violation and upheld the criminal charges against him. However, the court found a jeopardy violation as to defendant Turner and dismissed the criminal charges against him. (*People* v. *Towns*, 269 Ill.App.3d 907, 646 N.E.2d 1366, 207 Ill. Dec. 279 (2nd Dist. 1995)). The second decision, involving respondent Kimery and the Minor, P.S., held that forfeitures of property belonging to the respondent and the minor constituted initial jeopardies and therefore ordered

the dismissal of the respective criminal charges. (*In re P.S., a Minor, et al*), Nos. 2-93-1050 and 2-93-1212 (Rule 23 Order entered March 1, 1995)).

Petitioner, the People of the State of Illinois, appealed the decisions in the cases of defendant Turner, respondent Kimery and P.S., a Minor, to the Supreme Court of Illinois in one consolidated appeal. In its decision, the Supreme Court of Illinois reversed the dismissal of criminal charges against defendant Turner and the minor, P.S., but affirmed the dismissal of criminal charges against respondent Kimery finding them barred by double jeopardy considerations. (*In re P.S., a Minor, et al*), ___ Ill.2d ___ (Nos. 78910 and 78944 cons., January 18, 1996)). The instant petition addresses only the matter involving respondent Kimery. A factual history of that case follows.

On October 22, 1991, the respondent, John Kimery, was indicted by a Grand Jury in the Circuit Court of Kane County, Illinois, on one count of unlawful possession of a controlled substance, *Ill.Rev.Stat.*1991, ch. 56½, par. 1402(c). (C. 5).[1]

The indictment stemmed from an October 6, 1991 incident which also resulted in the seizure of the respondent's automobile. (F.R. 24). That vehicle was the subject of a forfeiture action commenced on November 1, 1991. (F.C. 1). The Circuit Court of Kane County, Illinois subsequently ordered the automobile forfeited, and the Illi-

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[1] The record on appeal below consisted of the record from defendant Kimery's criminal case and the record from the forfeiture case. References to the criminal record will be cited as "C.C. ___" or "C.R. ___." References to the forfeiture record will be cited as "F.C. ___" or "F.R. ___."

nois Appellate Court affirmed the forfeiture in an opinion filed on February 22, 1994. (*People* v. *One 1982 Maroon Ford Mustang*, 258 Ill.App.3d 127, 630 N.E.2d 137, 196 Ill.Dec. 440 (2nd Dist. 1994)).

The respondent entered a plea of guilty in the criminal case on April 12, 1993. (C.C. 54). Prior to sentencing, the respondent moved to vacate his guilty plea and dismiss the charges against him. (C.C. 58). The basis for the motion to dismiss was that the criminal prosecution was barred by double jeopardy in light of the previous forfeiture. The Circuit Court of Kane County, Illinois denied the respondent's motion and sentenced him to a one year term of imprisonment. (C.C. 89). The respondent timely appealed, and the Appellate Court of Illinois, Second Judicial District, vacated the denial of the motion to dismiss, vacated the conviction and sentence against respondent Kimery, and dismissed the criminal charges against him. Petitioner sought leave to appeal to the Supreme Court of Illinois.

The Supreme Court of Illinois affirmed the Appellate Court decision on January 18, 1996, finding that the criminal prosecution of respondent Kimery following the forfeiture of his vehicle was prohibited by the double jeopardy clause. Petitioner now timely petitions this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR PARALLEL CIVIL FORFEITURE AND CRIMINAL ACTIONS.

The respondent, John Kimery, was charged with a violation of the Illinois Controlled Substances Act, (720 ILCS 570/100 *et seq.* (West 1992) (formerly *Ill.Rev.Stat.* 1991, ch. 56½, par. 1100 *et seq.*)). The incident which resulted in the criminal charge also resulted in a forfeiture action pursuant to the forfeiture provisions of the Controlled Substances Act, against an automobile seized from the respondent. The forfeiture action resulted in the forfeiture of the property. (F.C. 49). Following the forfeiture, the respondent filed a motion to dismiss the criminal charges against him, claiming that the criminal prosecution was barred by double jeopardy. The trial court denied the motion. (C.C. 89).

On appeal, both the Appellate Court of Illinois, Second Judicial District, and the Supreme Court of Illinois held that the trial court had erred and determined that the forfeiture of the respondent's vehicle constituted punishment for the purposes of double jeopardy and barred a conviction resulting from a parallel criminal prosecution. *In re P.S., a Minor, et al*, Nos. 2-93-1050 and 2-93-1212 (Rule 23 Order entered March 1, 1995); ___ Ill.2d ___ (Nos. 78910 and 78944, January 18, 1996).

The Supreme Court of Illinois determined that a civil asset forfeiture under the forfeiture provisions of the Controlled Substances Act or the Cannabis Control Act constitutes a punishment, implicating the double jeopardy clause barring a subsequent criminal prosecution based on the same conduct which resulted in the forfei-

ture. The Court's conclusion is grounded in its interpretation of *Austin* v. *United States*, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), *Department of Revenue of Montana* v. *Kurth Ranch*, ___ U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), and *United States* v. *Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). It is the position of the Supreme Court of Illinois that those decisions apply to drug asset forfeitures and require the conclusion that the forfeiture in the instant case implicated double jeopardy and barred a conviction resulting from a parallel criminal prosecution. Petitioner submits that the conclusion reached by the Supreme Court of Illinois stems from an erroneous interpretation of the subject statutes and caselaw.

Initially, Petitioner questions the Illinois Supreme Court's interpretation of and reliance on this Court's decisions in *Austin* and *Kurth Ranch*, in the context of a Fifth Amendment double jeopardy challenge involving a civil asset forfeiture. Petitioner acknowledges that the decisions in *Austin* and *Kurth Ranch* share certain language that has become a kind of mantra in the current civil asset forfeiture debate, but asserts that those two decisions do not resolve the issues presented in this case.

In *Austin*, which contemplated the applicability of the excessive fines clause of the Eighth Amendment to forfeiture proceedings, this Court stated that forfeitures under the federal statutory provisions for forfeiture of real property and vehicles used to facilitate drug crimes, (21 U.S.C. §§ 881(a)(4) and (a)(7)), constitute monetary punishment and are subject to the limitations of the Eighth Amendment. (113 S.Ct. at 2812). Although this Court referred to the double jeopardy clause in an early footnote in the decision (113 S.Ct. at 2805), the case did

not involve a double jeopardy issue. While the footnote reference may indicate that this Court was aware of potential jeopardy implications, it did not grapple with the double jeopardy issue at any point in the decision. Petitioner submits that by labeling forfeitures "punishment" for purposes of Eighth Amendment scrutiny, this Court did not settle this double jeopardy argument involving the Fifth Amendment. A determination that forfeiture triggers an excessive fines analysis contemplates a possible reduction in sanction if the forfeiture is found excessive. This is very different indeed from the termination of a criminal action against a defendant which would result from the blanket application of the *Austin* language to Fifth Amendment double jeopardy.

Similarly, reliance on *Kurth Ranch* was inappropriate. *Kurth Ranch* involved a tax, distinguishing it from a forfeiture case. Additionally, *Kurth Ranch* is a very fact-specific decision, construing a particular Montana tax statute. Nothing in that decision directed a specific finding in this case, and this Court endeavored to limit the decision to its facts. (511 U.S. ___, 114 S.Ct. at 1497, fn. 21).

The Illinois Supreme Court's interpretation of *Austin* and *Kurth Ranch* as applicable to the instant case found support in decisions from various state and federal appeals courts, particularly those located within the purview of the Ninth Circuit Court of Appeals. Prominently cited is *United States* v. *$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), in which the Ninth Circuit Court of Appeals found *Austin* definitive on the issue of forfeitures and double jeopardy. The focus in *$405,089.23 U.S. Currency*, as in the Illinois Supreme Court decision, was on the characterization of an asset forfeiture as

"punishment." As *Austin* acknowledged, this is not a new concept; forfeiture throughout the ages has been recognized as at least partially punitive. (*Austin*, 113 S.Ct. at 2806-2809).

The reasoning behind the leap from *Austin's* restatement that a forfeiture has a "punishment" component to the conclusion that a forfeiture implicates double jeopardy apparently rests with the notion that forfeiture, as a "punishment," necessarily triggers what is referred to as the multiple punishment prong of the double jeopardy clause. (*See, North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). Petitioner asserts that such a leap oversimplifies the complex distinctions between the Excessive Fines Clause and the Double Jeopardy Clause. It is the intent of the Double Jeopardy Clause that should be the focus of a review of this issue.

The Illinois legislature enacted provisions for *in rem* forfeitures within the Controlled Substances Act as part of a comprehensive system aimed at controlling the use and distribution of cannabis and controlled substances. (720 ILCS 570/401 et seq. (West 1992)). The enactment of a criminal penalty and a civil sanction for an offense has been an historically accepted practice not offensive to double jeopardy protections. In a concurring opinion in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943), Justice Frankfurter observed:

> "[L]egislation of this character providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding. . .was quite common when the Fifth Amendment was framed by Congress. [Citations omitted]. Like other

> specific provisions of the Constitution, the double jeopardy clause must be read in the context of its times. It would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification."

(63 S.Ct. at 390). Petitioner acknowledges that this line of analysis calls into question the viability of the "multiple punishment" prong of the double jeopardy clause as it has evolved in the context of civil forfeitures. This question is not novel, having been addressed by Justice Scalia in his dissent in *Kurth Ranch*. (511 U.S. at ___, 114 S.Ct. at 1955).

The idea that a civil forfeiture and a criminal prosecution based upon the same conduct causes one to be "twice put in jeopardy of life or limb," the conduct prohibited by the double jeopardy clause, mocks the clause itself. The legislature is permitted to enact punishments it deems appropriate, and a determination that multiple sanctions are appropriate does not cause a jeopardy concern. This Court has noted this, stating that, "the question whether punishments imposed by a court after the defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." (*Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980)). In *Whalen*, this Court explained that imposition of a fine *and* a prison sentence where the legislature had provided for a fine *or* a prison sentence would violate double jeopardy. A fine and a prison term provided by a legislature, however, would not cause such a concern. (100 S.Ct. at 1436). Justice

Blackmun, in a concurring opinion stated, "The *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended." (100 S.Ct. at 1440). Nothing in the instant case overreaches the intent of the legislature.

The canard that the forfeiture and criminal prosecution in the instant case constitute jeopardy violative multiple punishments is disputed by the suggestions of the very courts that perpetuate it. In *$405,089.23 U.S. Currency*, the Ninth Circuit Court of Appeals suggested that the jeopardy violation could be avoided by bringing the forfeiture action simultaneously with the criminal action. (33 F.3d at 1216). Petitioner respectfully questions the logic of that conclusion. A forfeiture is an *in rem* proceeding. *In rem* is "a term used to designate proceedings or actions instituted against the thing," as opposed to personal actions. (*Black's Law Dictionary*, 5th Ed.). It is this legal fiction of *in rem* proceedings that results in separate actions for the civil forfeiture and the criminal prosecutions. Petitioner does not contend for purposes of this argument that the traditional *in rem* nature of civil forfeitures precludes them from imposing punishment. (*See*, *Austin*, 509 U.S. at ___, 113 S.Ct. at 2808, fn. 9). It is the adoption of the legal fiction of *in rem* proceedings by our court systems, however, that leads to individual forfeiture and criminal actions.

Imposing criminal punishments and forfeitures in the same proceeding—the same courtroom—does not alter the sanctions themselves. The defendant still suffers a criminal penalty and the property is still forfeited,

whether on one day in one courtroom or in separate courtrooms several weeks apart. The suggestion that a literal "single proceeding" is somehow less violative of the double jeopardy clause than two proceedings when the "punishments" remain the same is merely a further legal fiction.

The Second and Eleventh and most recently the Eighth Circuit United States Courts of Appeals have recognized the absurdity of requiring a literal "single proceeding," and have instead found forfeiture actions and criminal prosecutions based upon the same conduct to be parts of a single, coordinated prosecution. The United States Court of Appeals—Second Circuit addressed the issue in *United States* v. *Millan*, 2 F.3d 17 (2nd Cir. 1993). *Millan* involved a criminal indictment against the defendants for drug offenses and a criminal forfeiture action as well as a civil forfeiture action against their property under the federal civil forfeiture statute. (2 F.3d at 18). Before trial on the criminal charges, the defendants entered into an agreed stipulation under which the civil suit was dismissed in return for the forfeiture of some of the property named in the criminal and civil forfeiture actions. (2 F.3d at 19). The defendants subsequently moved to dismiss the criminal indictment on double jeopardy grounds. (*Id.*)

The Circuit Court of Appeals found no double jeopardy implications as a result of the simultaneous criminal and civil forfeiture actions, holding that they were "but different prongs of a single prosecution of the [defendants] by the government." (2 F.3d at 20). The Court cited several factors in reaching its conclusion, finding persuasive the fact that the warrants for civil seizure and criminal arrest were issued on the same date and were based on

the same affidavit of a DEA agent and that the defendants were aware of the criminal charges against them when they entered into the stipulation. (*Id.*)

The United States Court of Appeals—Eleventh Circuit similarly held that there was no double jeopardy bar to a forfeiture action after a criminal conviction had been obtained against the defendant in *United States* v. *One Single Family Residence Located at 18755 North Bay Road*, 13 F.3d 1493 (11th Cir. 1994). In *18755 North Bay Road*, the forfeiture action was commenced the day after seizure of the property, but an indictment was filed five months later. A government motion for summary judgment in the forfeiture action was granted following the defendant's conviction. (13 F.3d at 1494-1495). The Eleventh Circuit Court of Appeals, citing *Halper* and *Millan*, held that the "circumstances of the simultaneous pursuit by the government of criminal and civil sanctions against [the defendant] . . . falls within the contours of a single, coordinated prosecution." (13 F.3d at 1499). Most recently, the United States Court of Appeals—Eighth Circuit found no jeopardy violation where a forfeiture action was commenced two days after an indictment and the defendant settled the forfeiture action before pleading guilty to one count of the indictment. (*United States* v. *Smith*, ___ F.3d ___ (No. 95-1568, 8th Cir., January 31, 1996)).

The *Millan* Court was not persuaded by the defendant's argument that the civil and criminal actions were filed separately, with different docket numbers, thereby showing distinct actions. In deciding whether a single proceeding exists, the Court stated, it "must look past the procedural requirements [of the court system] and examine the essence of the actions at hand by determin-

ing when, how, and why the civil and criminal actions were initiated." (2 F.3d at 20). Similarly, the *Smith* Court noted that the "commonplace observation" that criminal and civil matters are adjudicated in separate cases in our justice system should not preclude prosecutors from seeking both criminal and civil penalties against drug offenders. (*Smith*, ___ F.3d at ___ (Slip Op., p. 3).

As in the federal system, civil and criminal actions are separately docketed in Illinois. The differing case numbers here do not undermine the Petitioner's position that it was pursuing a single, coordinated prosecution of the respondent. The civil and criminal actions were initiated on the same dates, by the seizure of the vehicle and the arrest of the respondent. The actions were undertaken by the Kane County State's Attorney's Office which sought to obtain the full range of civil and criminal penalties authorized by the legislature. The "why," "when" and "how" of these actions indicate a single coordinated prosecution in each case.

In *Millan*, *18755 North Bay Road* and *Smith*, the Courts addressed the concern expressed in *Halper* that the government might act abusively by seeking a second punishment when it is dissatisfied with the sanction levied in the first action. (*Halper*, 109 S.Ct. at 1903, n. 10; *Millan*, 2 F.3d at 20-21; *18755 North Bay Road*, 13 F.3d at 1499; *Smith*, ___ F.3d at ___, (Slip Op., p. 3)). Each court stated that the legislature authorized cumulative punishment under two statutes and that the procedural record in each case showed the civil and criminal prosecutions to be contemporaneous rather than consecutive. (*Millan*, 2 F.3d at 20; *18755 North Bay Road*, 13 F.3d at 1499; *Smith*, F.3d at ___ (Slip Op., p. 3)). The

records in the instant case demonstrates that the civil and criminal actions were contemporaneous, not consecutive. The seizure and arrest occurred on the same date. The proceedings in each case tracked one another, and nothing in the records suggests an abusive action by the government to seek a second punishment due to dissatisfaction with the outcome of the first action. No punishment had yet been imposed in either case on the date of its initiation. The respondent was aware of the ongoing civil and criminal prongs of the prosecution from the onset.

The Supreme Court of Illinois rejected the Petitioner's argument that it was pursuing a single, coordinated prosecution of the respondent by all means made available to it under the Controlled Substances Act. (*P.S.*, ___ Ill.2d at ___ (Slip Op. at 23-24)). The Petitioner contends that the Illinois Supreme Court's rejection stems from its continued failure to recognize that the double jeopardy clause does not bar separate civil and criminal proceedings in this context. Petitioner cites again the comments of Justice Frankfurter, concurring in *Hess*:

> "In my view, the proper approach to the problem of double jeopardy in a situation. . .where Congress has imposed two sanctions for misconduct, however one may label them, and has provided for their enforcement in two separate proceedings, is that which was taken by Judge (later Mr. Justice) Blatchford in *Re Leszynsky* [Citations omitted]. The short of it is that where two such proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, *they do not twice put a man in jeopardy for the same offense*. Congress thereby merely allows the comprehensive penalties which it has imposed to be enforced in separate suits instead of a single pro-

> ceeding. By doing this Congress does not impose more than a single punishment. And the double jeopardy clause does not prevent Congress from prescribing such a procedure for the vindication of punitive remedies." (Emphasis added.)

(*Hess*, 63 S.Ct. at 389-390).

Petitioner asserts that reliance by the Supreme Court of Illinois on *Austin* and *Kurth Ranch* is misplaced, as those decisions are not directed at this issue and therefore do not provide a catalyst for this line of litigation. If forfeiture as "punishment" violates double jeopardy, it has been doing so forever. The mere use of the term "punishment" to describe forfeitures in the *Austin* decision does not necessarily trigger what is referred to as the multiple punishment prong of the double jeopardy clause. The excessive fines analysis in *Austin* provides protection against arbitrary and grossly disproportionate forfeitures. Legislatures are given the power to promulgate laws and set forth appropriate consequences for various actions by citizens. The Excessive Fines Clause provides the substantive limits on the bounds of the legislative punishment. Broader application of the *Austin* decision is unnecessary.

The Illinois legislature properly authorized both civil and criminal penalties for a violation of the Controlled Substances Act. Simultaneous efforts to obtain both civil and criminal penalties in these cases do not constitute a violation of the Double Jeopardy Clause. Petitioner requests that this Court grant certiorari to examine the multiple punishments prong of the Double Jeopardy Clause and the applicability of its decision in *Austin* thereto, and further requests that the judgment of the Supreme Court of Illinois be reversed.

II.

A CIVIL FORFEITURE AND A CRIMINAL PROSECUTION DO NOT CONSTITUTE DOUBLE JEOPARDY UNDER THE *BLOCKBURGER* TEST.

Double jeopardy principles do not prohibit the imposition of all successive punishments, but only those imposed for the same offense. (*United States* v. *Dixon*, ___ U.S. ___, 113 S.Ct. 2849, 2855, 125 L.Ed.2d 556 (1993)). In the case at bar, the Supreme Court of Illinois concluded that the civil forfeiture and criminal conviction constituted punishments for the same offense. (*In re P.S., a Minor, et al*, ___ Ill.2d ___, (Nos. 78910 & 78944, January 18, 1996) (Slip Op., p. 13)). The Petitioner must disagree. Even if this Court should determine that a civil asset forfeiture constitutes punishment for purposes of double jeopardy and can potentially bar a subsequent criminal prosecution, the Illinois actions involved here do not constitute the same offense.

The test for determining whether the two offenses for which a defendant is being punished are jeopardy violative is set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.2d 306 (1982), and reaffirmed in *United States* v. *Dixon*, *supra*. The same-elements, or *Blockburger*, test inquires whether each offense contains an element not contained in the other; if so, then there is no jeopardy problem. When applying the *Blockburger* test, courts must focus upon "the statutory elements of each offense, rather than on the actual evidence presented at trial." (*Illinois* v. *Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980)).

A criminal prosecution and a civil forfeiture each always require proof of an element that the other does not. Therefore, separate criminal prosecutions and civil

forfeitures, even where based on precisely the same statutory violations and criminal conduct, do not implicate the Double Jeopardy Clause. In a criminal case, because the statute is *in personam*, the prosecution must prove that the crime was committed *by the defendant*. However, because a forfeiture case is *in rem*, the defendant's involvement is not an element that the prosecution must prove. Conversely, in a forfeiture case the State must prove that the subject property was involved in a criminal offense, while a criminal prosecution contains no such element. Thus, under the *Blockburger* test, a civil forfeiture never has the "same elements" as a criminal offense.

In the instant matter, the respondent was charged with possession of a controlled substance pursuant to *Ill. Rev.Stat.*1991, ch. 56½, par. 1402(c). The respondent's vehicle was ordered forfeited pursuant to section 505(a)(3) of the Illinois Controlled Substances Act, which provides for forfeiture of "vehicles . . . which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of" controlled substances. (*Ill.Rev.Stat.*1991, ch. 56½, par. 1505(a)(3)).

The Supreme Court of Illinois held that "any forfeiture under section 505(a)(3) . . . requires proof of a criminal offense under the Controlled Substances Act," and reasoned, therefore, that "the State could not confiscate [Respondent] Kimery's vehicle without a showing that *he* possessed a controlled substance." (*P.S.*, ___ Ill.2d at ___ (Slip Op., p. 13)). (Emphasis added.) Since a conviction for possession of a controlled substance requires the State to prove the *defendant* possessed the substance, the Supreme Court of Illinois determined that the

offenses required proof of the same elements and were, therefore, the same offense.

The Supreme Court of Illinois suggests that any other conclusion is the result of a circular or illusory theory, citing several federal circuit court decisions. Additionally, the Supreme Court of Illinois cites *Austin*, stating that that decision seems to set aside the legal fiction of *in rem* that the property, rather than the owner, is the offender. (*Id*). Petitioner respectfully suggests that nothing in the *Austin* decision defeats the conclusion that the criminal offense requires proof that the forfeiture action does not. Although this Court did suggest in *Austin* that a civil forfeiture acts as "punishment" to the property owner (509 U.S. at ___, 113 S.Ct. at 2809), the fact remains that forfeiture of property can occur without any criminal action by its owner. The statute requires proof of a criminal offense, but does not specify that the offense be committed by the property owner. (*Ill.Rev.Stat.*1991, ch. 56½, par. 1402).

The Supreme Court of Illinois seems to confuse this Court's conclusions in *Austin* regarding punishment of an owner with the idea of an offense by the property owner. The Petitioner requests that this Court grant certiorari to examine the applicability of the *Blockburger* test in this context and reverse the judgment of the Supreme Court of Illinois.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the decision of the Supreme Court of the State of Illinois

and, upon review, to reverse that court's decision in this case.

Respectfully submitted,

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APPENDIX A

In re P.S., a Minor (The People of the State of Illinois, Appellant, v. P.S., Appellee).

The People of the State of Illinois, Appellant,
v.
John Kimery, Appellee.
The People of the State of Illinois, Appellant,
v.
Roderick Turner, Appellee.
Nos. 78910, 78944.
Supreme Court of Illinois.
Jan. 18, 1996.

Justice Miller delivered the opinion of the court:

The sole question presented in these consolidated appeals is whether the constitutional guarantees against double jeopardy prohibit a criminal prosecution following a civil forfeiture judgment based on the same conduct. (U.S. Const., amend. V; Ill. Const. 1970, art. I, §10.) Although this court rejected a similar claim in *People* v. *1988 Mercury Cougar* (1992), 154 Ill.2d 27, the appellate court concluded that a contrary conclusion was mandated by recent United States Supreme Court decisions. (See *Department of Revenue* v. *Kurth Ranch* (1994), 511 U.S. __, 128 L.Ed.2d 767, 114 S.Ct. 1937; *Austin* v. *United States* (1993), 509 U.S. __, 125 L.Ed.2d 488, 113 S.Ct. 2801.) In resolving the issue on appeal, we are therefore called upon to reconsider our decision in *1988 Mercury Cougar* in light of these recent Supreme Court decisions.

Defendants, P.S., a minor, John Kimery, and Roderick Turner, were each charged by complaint and/or indictment in the circuit court of Kane County with violations

of the Illinois Controlled Substances Act (Controlled Substances Act) (720 ILCS 570/100 *et seq.* (West 1992) (formerly Ill.Rev.Stat.1991, ch. 56 1/2, par. 1100 *et seq.*)) or the Cannabis Control Act (720 ILCS 550/1 *et seq.* (West 1992) (formerly Ill.Rev.Stat.1991, ch. 56 1/2, par. 701 *et seq.*)). In conjunction with defendants' arrest on these charges, police seized cash and/or an automobile, and the State subsequently sought forfeiture of these items under the Controlled Substances Act (720 ILCS 570/505 (West 1992)) or the Cannabis Control Act (720 ILCS 550/12 (West 1992)), and the Drug Asset Forfeiture Procedure Act (Forfeiture Act) (725 ILCS 150/1 *et seq.* (West 1992) (formerly Ill.Rev.Stat.1991, ch. 56 1/2, par. 1671 *et seq.*)). In each case, the trial judge ordered the property forfeited. Defendants then moved to dismiss the criminal charges against them on double jeopardy grounds. The motions to dismiss were denied.

On appeal, the appellate court found that the civil forfeitures constituted punishment for double jeopardy purposes and that the forfeiture proceedings were separate from the criminal proceedings. The appellate court therefore concluded that further prosecution of defendants for the same offense that resulted in the prior forfeitures was barred by double jeopardy. Consequently, all criminal charges against defendants were dismissed. See 269 Ill.App.3d 907; Nos. 2-93-1050, 2-93-1212 cons. (unpublished order under Supreme Court Rule 23).

We granted the State's separate petitions for leave to appeal in cause Nos. 78910 and 78944 and consolidated the causes on appeal for purposes of argument and disposition. (145 Ill.2d R. 315(a).) We also granted leave to the Cook County State's Attorney to submit a brief as *amicus curiae* on behalf of the State. (134 Ill.2d R. 345.)

For the reasons that follow, we affirm in part and reverse in part the judgment of the appellate court in cause No. 78910 and reverse the judgment of the appellate court in cause No. 78944.

BACKGROUND

Cause No. 78944

The substantive facts in each case are undisputed and may be briefly summarized. Because the appellate court in the cases of P.S. and Kimery cited the appellate court's decision in Turner's case, we will begin by first reviewing the facts in Turner's case.

In No. 78944, defendant Turner, on January 5, 1993, was charged by indictment in the circuit court of Kane County with unlawful possession of a controlled substance (720 ILCS 570/402(a)(2) (West 1992)), unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2) (West 1992)), and unlawful possession of a controlled substance without a tax stamp (35 ILCS 520/10 (West 1992)). The indictment against Turner resulted from the execution of a search warrant on Tuner's residence on December 10, 1992. During the execution of the search warrant, police seized cocaine and $2,165 in cash.

On December 23, 1992, before Turner was indicted, the State initiated an administrative forfeiture action against the $2,165 found in the search of Turner's home. (See 725 ILCS 150/6(A) (West 1992).) Turner thereafter filed a verified claim and cost bond with the Kane County State's Attorney, asserting his interest in the cash seized and requesting its return. (See 725 ILCS 150/6(C) (West 1992).) Because Turner contested the forfeiture,

the State then instituted a judicial *in rem* forfeiture suit against the cash under the Controlled Substances Act (720 ILCS 570/505(a)(5) (West 1992)) and the Forfeiture Act (725 ILCS 150/7(1) (West 1992)). The forfeiture complaint alleged that the cash seized was subject to forfeiture because it was furnished or intended to be furnished in exchange for a substance in violation of the Controlled Substances Act or represented the proceeds of such an exchange. 720 ILCS 570/505(a)(5) (West 1992); 725 ILCS 150/7(1) (West 1992).

On August 20, 1993, a hearing was held in the forfeiture case. Following the hearing, the trial judge ordered the cash forfeited to the State. No appeal was taken from the forfeiture order.

On September 30, 1993, Turner moved to dismiss the pending criminal indictment against him on double jeopardy grounds. In the motion, Turner alleged that the actions forming the basis for the criminal proceeding were the same actions underlying the forfeiture proceeding. Citing *Austin*, Turner also alleged that the civil forfeiture of the cash constituted punishment for double jeopardy purposes. In light of the forfeiture, Turner contended that a subsequent criminal prosecution for the same offense that resulted in the forfeiture would violate the double jeopardy clauses of the United States and Illinois Constitutions (U.S. Const., amend. V; Ill. Const. 1970, art. I, §10). On January 13, 1994, the trial judge denied the motion to dismiss.

On appeal, the appellate court concluded that the State's attempt to criminally prosecute Turner following the judicial forfeiture of the $2,165 violated the constitutional prohibition against double jeopardy. In reaching this conclusion, the court reviewed the Supreme Court's

decisions in *United States* v. *Halper* (1989), 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892, *Austin*, *Kurth Ranch*, and the United States Court of Appeals for the Ninth Circuit's decision in *United States* v. *$405,089.23 United States Currency* (9th Cir.1994), 33 F.3d 1210, *petition for cert. filed* (U.S. August 28, 1995), No. 95-346, 64 U.S.L.W. 3289. Relying primarily on these decisions, the appellate court concluded that the forfeiture of the cash constituted punishment for double jeopardy purposes. (269 Ill.App.3d at 915.) The appellate court acknowledged that its decision conflicted with this court's decision in *1988 Mercury Cougar*, but reasoned that it was compelled to reach the opposite conclusion in light of *Austin* and *Kurth Ranch*, which were decided after this court's decision in *1988 Mercury Cougar*. (269 Ill.App.3d at 915.) This court in *1988 Mercury Cougar* held that the civil forfeiture of property following a criminal proceeding based on the same offense did not constitute a second punishment for double jeopardy purposes. (*1988 Mercury Cougar*, 154 Ill.2d at 37.) The appellate court also determined that the forfeiture proceeding was separate from the criminal proceeding. In doing so, the court rejected the State's argument that the civil and criminal actions were part of a single, coordinated prosecution of Turner. (269 Ill.App.3d at 916-18.) The appellate court vacated the trial judge's order denying Tuner's motion to dismiss and dismissed with prejudice the criminal charges against him. We thereafter granted the State's petition for leave to appeal. 145 Ill.2d R. 315(a).

Cause No. 78910

In No. 78910, defendant P.S. was charged by complaint in the circuit court of Kane County on May 4, 1991, with

unlawful possession of cannabis (Ill.Rev.Stat.1991, ch. 56 1/2, par. 704(d)) and unlawful possession of cannabis with intent to deliver (Ill.Rev.Stat.1991, ch. 56 1/2, par. 705(d)). P.S. was also charged by indictment for these same offenses on July 21, 1992. The criminal charges against P.S. stemmed from the execution of a search warrant on May 3, 1991, against P.S.'s car, person, and residence. The search resulted in the seizure of numerous items, including cannabis, drug paraphernalia, a 1982 Cadillac Eldorado, and $1,627.22 in cash.

On September 3, 1991, while the criminal charges were pending against P.S., the State sought forfeiture of the cash under the Cannabis Control Act (Ill.Rev.Stat.1991, ch. 56 1/2, par. 712) and the Forfeiture Act (Ill.Rev.Stat. 1991, ch. 56 1/2, par. 1679). The amended complaint for forfeiture alleged that the cash was in close proximity to forfeitable substances and drug paraphernalia and therefore was itself subject to forfeiture. (Ill.Rev.Stat.1991, ch. 56 1/2, pars. 712, 1677.) In response to the forfeiture complaint, P.S. claimed to be the owner of the currency, but contended that the currency was not intended nor had it been used for any narcotics or controlled substance related purpose. P.S. therefore averred that the money was not subject to forfeiture. Following a bench trial in the forfeiture action on August 31, 1992, the trial judge found that the $1,627.22 was subject to forfeiture (see Ill. Rev.Stat.1991, ch. 56 1/2, par. 712(a)(5)) and ordered the cash forfeited to the State. No appeal was taken from this order.

On February 3, 1993, the criminal charges against P.S. were transferred to the juvenile court for adjudication. (See 720 ILCS 550/7(b) (West 1992).) The State then filed a petition for adjudication, requesting that the trial judge

find P.S. delinquent based on the charges. P.S. subsequently moved to dismiss the criminal charges against him or, in the alternative, to stay the proceedings based on double jeopardy grounds. In the motion, P.S. contended that he had already been punished for his conduct as a result of the forfeiture of the cash and therefore could not be prosecuted for the same conduct in the juvenile proceeding without violating the double jeopardy clauses of the United States and Illinois Constitutions (U.S. Const., amend. V; Ill. Const.1970, art. I, §10).

On September 1, 1993, the motion was denied. P.S. then appealed the denial of his motion to the appellate court. The appellate court stayed the proceedings in the trial court pending resolution of the appeal. Relying primarily on *Austin*, *Kurth Ranch*, and *United States Currency*, the appellate court found that the forfeiture of the cash constituted punishment for double jeopardy purposes. The court further determined that the forfeiture proceeding was separate from the criminal proceeding, rather than being part of a single, coordinated prosecution of P.S. The court therefore vacated the trial judge's order denying P.S.'s motion to dismiss and dismissed with prejudice the delinquency petition. (Nos. 2-93-1050, 2-93-1212 cons. (unpublished order under Supreme Court Rule 23).) The court also noted that its recent decision in *People* v. *Towns* (1995), 269 Ill.App.3d 907, provided further support for its decision here.

Also, in No. 78910, defendant Kimery was charged by indictment in the circuit court of Kane county on October 22, 1991, with unlawful possession of a controlled substance (Ill.Rev.Stat.1991, ch. 56 1/2, par. 1402(c)). The charge stemmed from an alleged incident that occurred on October 6, 1991, which resulted in the seizure of Kimery's automobile.

On November 18, 1991, while the above charge was pending against Kimery, the State filed an *in rem* forfeiture action against Kimery's vehicle, a 1982 Maroon Ford Mustang (Ill.Rev.Stat.1991, ch. 56 1/2, pars. 1505(a)(3), 1679). The forfeiture complaint alleged that on October 6, 1991, police observed Kimery, the driver of the subject vehicle, stop the vehicle and speak to two males, one of whom was identified as Larry Harris. After speaking with Kimery, the two men proceeded to enter a nearby building and then return to Kimery's car. Kimery then unlocked the passenger door and allowed Harris to enter the vehicle. The police next observed Kimery receive a small, white bag from Harris in exchange for two bills of United States currency. Following this transaction, officers conducted a stop of Kimery and Harris and recovered a plastic bag, later identified as containing cocaine, from Kimery. The complaint further alleged that Kimery was the registered owner of the vehicle and that the vehicle was subject to forfeiture because it was used to facilitate the sale, receipt, possession, and concealment of a controlled substance (see Ill.Rev.Stat.1991, ch. 56 1/2, par. 1505(a)(3)).

Kimery subsequently appeared as owner-claimant in the forfeiture proceeding, seeking return of the vehicle. In Kimery's second-amended answer to the forfeiture complaint, he admitted that he was the owner of the car, but denied that it was used to facilitate the alleged drug transaction. Kimery therefore contended that the vehicle was not subject to forfeiture and requested its return. Following a bench trial on May 26, 1992, the vehicle was ordered forfeited to the State. The order was affirmed on appeal to the appellate court. See *People* v. *One 1982 Maroon Ford Mustang* (1994), 258 Ill.App.3d 127.

On August 13, 1992, Kimery moved to dismiss the criminal charge against him on double jeopardy grounds. The motion was taken under advisement pending this court's decision in *1988 Mercury Cougar*. On April 12, 1993, defendant entered a plea of guilty. Prior to sentencing, Kimery moved to withdraw his guilty plea and dismiss the charges or, in the alternative, to stay sentencing. Relying in part on *Austin*, Kimery argued that the forfeiture of the car constituted punishment for double jeopardy purposes and therefore any further punishment for the same offense that resulted in the forfeiture was barred by double jeopardy. The trial judge denied Kimery's motion and sentenced him to one year's imprisonment. Execution of the sentence was stayed pending appeal.

On appeal, the appellate court consolidated Kimery's appeal with P.S.'s appeal for purposes of disposition only. As in P.S.'s case, the appellate court concluded that criminally prosecuting Kimery following the forfeiture of his automobile violated the double jeopardy clause. Accordingly, the appellate court vacated Kimery's conviction and sentence and dismissed with prejudice the criminal charges against him. (Nos. 2-93-1050, 2-93-1212 cons. (unpublished order under Supreme Court Rule 23).) We granted the State's petition for leave to appeal in cause No. 78910 and consolidated it with the State's appeal in cause No. 78944. 145 Ill.2d R. 315(a).

DISCUSSION

On appeal to this court, the State argues that the appellate court erred in finding that the double jeopardy clause barred the criminal prosecution of defendants fol-

lowing a civil asset forfeiture based on the same conduct that resulted in the forfeiture.

The double jeopardy clause of the fifth amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." (U.S. Const., amend.V.) Protections against double jeopardy are similarly guaranteed by the Illinois Constitution of 1970, which provides that "[n]o person shall be * * * twice put in jeopardy for the same offense." (Ill. Const.1970, art. I, §10.) In raising their constitutional claims in the trial court, defendants relied on both the Federal and State Constitutions. Neither the State nor the defendants have argued, however, that a double jeopardy analysis under the State constitution should differ from an analysis under the Federal Constitution. (See *People* v. *Levin* (1993), 157 Ill. 2d 138, 160 (finding no indication that the double jeopardy clause of the Illinois constitution was intended to be construed differently than the Federal provision).) We therefore analyze the State's argument here only under the double jeopardy clause of the fifth amendment to the Federal Constitution.

The constitutional prohibition against double jeopardy safeguards against three distinct abuses: (1) a second prosecution after acquittal; (2) a second prosecution after conviction; and (3) multiple punishments for the same offense. (*Kurth Ranch*, 511 U.S. at __ n. 1, 128 L.Ed.2d at 773 n. 1, 114 S.Ct. at 1941 n. 1; *Schiro* v. *Farley* (1994), 510 U.S. __, __, 127 L.Ed.2d 47, 56, 114 S.Ct. 783, 789; *Halper*, 490 U.S. at 440, 104 L.Ed.2d at 496, 109 S.Ct. at 1897; *North Carolina* v. *Pearce* (1969), 395 U.S. 711, 717, 23 L.Ed.2d 656, 664-65, 89 S.Ct. 2072, 2076; see also *Levin*, 157 Ill.2d at 144; *Rehg* v. *Illinois*

Department of Revenue (1992), 152 Ill.2d 504, 521.) It is the third of these protections-the bar against multiple punishments-that is the subject of this appeal. The multiple-punishment prong of the double jeopardy clause protects against the State's seeking multiple punishments for the same offense in separate proceedings. (*Helvering* v. *Mitchell* (1938), 303 U.S. 391, 399, 82 L.Ed. 917, 922, 58 S.Ct. 630, 633.) It does not, however, prohibit the State from seeking multiple punishments in the same proceeding or trial, provided that the total punishment does not exceed that authorized by the legislature. *Halper*, 490 U.S. at 450, 104 L.Ed.2d at 503, 109 S.Ct. at 1903; *Kurth Ranch*, 511 U.S. at __, 128 L.Ed.2d at 778, 114 S.Ct. at 1945; *Missouri* v. *Hunter* (1983), 459 U.S. 359, 368-69, 74 L.Ed.2d 535, 543-44, 103 S.Ct. 673, 679.

To determine whether the State has violated the defendants' constitutional protections against double jeopardy here, we must make three key determinations: (1) whether the civil forfeitures in the instant cases constitute "punishment" for double jeopardy purposes; (2) whether the civil forfeitures and criminal prosecutions constitute punishment for the same offenses; and (3) whether the civil forfeitures and criminal prosecutions are separate proceedings. All three questions must be answered in the affirmative for double jeopardy to apply. *United States* v. *Ursery* (6th Cir.1995), 59 F.3d 568, 571, *petition for cert filed* (U.S. August 28, 1995), No. 95-345, 64 U.S.L.W. 3289.

1. Separate Offenses

To prevail on a double jeopardy challenge, a defendant must establish not only the existence of two punish-

ments, but also that he has been punished twice for the same offense. (U.S. Const., amend. V; Ill. Const.1970, art. I, §10.) *Amicus curiae* argues that the civil forfeitures and the criminal charges here do not constitute punishment for the same offenses because the forfeitures require proof that the property subject to forfeiture was involved in the commission of a crime, while the criminal charges require proof that defendants committed the crimes. Therefore, *amicus* contends that each offense requires an element the other does not and, consequently, the forfeitures and the criminal prosecutions cannot be considered punishments for the same offenses. *Amicus* also argues with regard to defendants Turner and P.S. that the proceeds which were the subject of the forfeitures in their respective cases were the result of a different violation from the one the defendants were charged with here. Consequently, *amicus* contends that the forfeitures and the criminal charges could not constitute punishment for the same offenses.

We note that neither the State nor the defendants have raised an issue regarding whether the forfeitures and the criminal prosecutions are punishment for the same offenses, although the State did discuss *amicus'* argument during oral argument before this court. We therefore would be justified in not considering the issue raised by *amicus*. (See *People* v. *P.H.* (1991), 145 Ill.2d 209, 234; *Archer Daniels Midland Co.* v. *Industrial Comm'n* (1990), 138 Ill.2d 107, 117.) However, because the issue is dispositive with respect to defendants Turner and P.S., we choose to address the question at this time. (*Cf. Teague* v. *Lane* (1989), 489 U.S. 288, 103 L.Ed.2d 334, 109 S.Ct. 1060 (addressing the issue of retroactivity although issue was raised only by *amicus* brief); see generally *Ursery*, 59

F.3d at 573-74; (addressing whether the civil forfeiture and criminal charges constituted punishment for the same offense); *United States* v. *One 1978 Piper Cherokee Aircraft, Tail No. 5538V, Including Its Tools & Appurtenances* (9th Cir.1994), 37 F.3d 489; *United States* v. *Sherret* (D.Ore.1995), 877 F.Supp. 519; *Crowder* v. *United States* (M.D.N.C.1994), 874 F.Supp. 700; *Quinones-Ruiz* v. *United States* (S.D.Cal.1994), 873 F.Supp. 359; *Houston* v. *Mile High Adventist Academy* (D.Co. 1994), 872 F Supp. 829; *United States* v. *McCaslin* (W.D. Wash.1994), 863 F.Supp. 1299.

In the context of multiple punishments, the Supreme Court has held that the double jeopardy bar applies if the two offenses for which the defendant is punished or tried violate the "same-elements" test. (*United States* v. *Dixon* (1993), 509 U.S. __, __, 125 L.Ed.2d 556, 568, 113 S.Ct. 2849, 2856, citing *Blockburger* v. *United States* (1932), 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180.) The "same-elements" test, commonly referred to as the *Blockburger* test, focuses on "whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment." (*Dixon*, 509 U.S at __, 125 L.Ed.2d at 568, 113 S.Ct. at 2856; *People* v. *Carrillo* (1995), 164 Ill.2d 144, 147.) Under *Blockburger* and its progeny, if a lesser included offense has been charged, the greater offense cannot subsequently be charged without violating the double jeopardy clause. (*Dixon*, 509 U.S. at __, 125 L.Ed.2d at 569, 113 S.Ct. at 2857; see also *Harris* v. *Oklahoma* (1977), 433 U.S. 682, 682, 53 L.Ed.2d 1054, 1056, 97 S.Ct. 2912, 2913; *Carrillo*, 164 Ill.2d at 147-48.) Under the *Blockburger* test, then, whether the forfeitures and the criminal prosecutions constitute punishment for the

same offenses depends on a comparison of the forfeiture allegations and the criminal charges.

In cause No. 78944, defendant Turner was charged with unlawful possession of a controlled substance (720 ILCS 570/402(a)(2) (West 1992)), unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2) (West 1992)), and unlawful possession of a controlled substance without a tax stamp (35 ILCS 520/10 (West 1992)). To support a conviction for unlawful possession of a controlled substance, the State must establish that Turner had knowledge of the substance's presence and that Turner had actual or constructive possession of the substance. (720 ILCS 570/402(a)(2) (West 1992).) In order to convict defendant of unlawful possession of a controlled substance with intent to deliver, the State must establish that defendant had the intent to deliver the controlled substance in addition to the above elements of unlawful possession. (720 ILCS 570/401 (a)(2) (West 1992).) For the final charge against Turner, the State would have to establish that Turner was a "dealer," that he possessed a controlled substance, and that he failed to affix the required tax stamp to the controlled substance. (35 ILCS 520/10 (West 1992).) In comparison, the State sought forfeiture of the cash because it was alleged to have been furnished or was intended to have been furnished in exchange for a substance in violation of the Controlled Substances Act or represented the proceeds of such an exchange. (720 ILCS 570/505(a)(5) (West 1992); 725 ILCS 150/7(1) (West 1992).) To establish the basis for the forfeiture, the State relied on the presumption that currency found in close proximity to forfeitable substances was furnished or intended to be furnished in exchange for a substance in

violation of the Controlled Substances Act or represented the proceeds of such an exchange. In making the determination that the cash was subject to forfeiture, the trial judge stated that the cash was the product of illegal activity.

The elements involved in the forfeiture of the cash in Turner's case are clearly distinguishable from the elements the State must prove to convict Turner of the offenses charged. None of the elements necessary to establish forfeiture of the cash are included in the elements needed to establish the three offenses Turner was charged with committing. Therefore, the forfeiture and the criminal prosecution against Turner would not be punishment for the same offense, and the State should be allowed to proceed on the criminal indictment against Turner. Moreover, we note that there is no factual link between the cash as proceeds of a drug transaction and the criminal offenses. The cash was seized during the execution of a search that resulted in the seizure of cocaine which, in turn, was the basis for the above charges being brought against Turner. The cash could not have been traced to the proceeds of any sale of any of the cocaine found in the indictment since defendant is charged with possession of that cocaine, which had not yet been sold. See *United States* v. *Leaniz* (S.D.Ohio March 31, 1995), No. CR-2-90-18; see also 1 D. Smith, Prosecution & Defense of Forfeiture Cases §12.10(3), at 12-157 (1995); *United States* v. *1181 Waldorf Drive, St. Louis, Missouri* (E.D.Mo.1995), 900 F.Supp. 1167, 1173.

A similar result is reached in cause No. 78910 with respect to P.S. Defendant P.S. was charged with unlawful possession of cannabis (Ill.Rev.Stat.1991, ch. 56 1/2, par. 704(d)) and unlawful possession of cannabis with

intent to deliver (Ill.Rev.Stat.1991, ch. 56 1/2, par. 705(d)). The State sought forfeiture of $1,627.22 on the basis that it was in close proximity to forfeitable substances and drug paraphernalia. The proximity of the cash to forfeitable substances gives rise to the presumption that it was furnished or intended to be furnished in exchange for a substance in violation of the Cannabis Control Act, or was the proceeds of such an exchange, and therefore forfeitable under the Forfeiture Act. (Ill. Rev.Stat.1991, ch. 56 1/2, pars.712, 1677.) The charged offenses and the forfeiture proceedings each require proof of different elements. Therefore, the charges against P.S. are based on offenses that are distinct from the forfeiture. The forfeiture of the cash consequently does not present a bar to P.S's trial on the criminal charges, and the State should be allowed to proceed with the charges against P.S.

A different result is reached with respect to Kimery, however. Kimery was charged with unlawful possession of a controlled substance. (Ill.Rev.Stat.1991, ch. 56 1/2, par. 1402(c).) The State sought forfeiture of his automobile, contending it was used to facilitate the sale, receipt, possession and concealment of a controlled substance possessed in violation of the Controlled Substances Act. (Ill.Rev.Stat.1991, ch. 56 1/2, par. 1505(a)(3).) Any forfeiture under section 505(a)(3) of the Controlled Substances Act, therefore, requires proof of a criminal offense under the Controlled Substances Act. Thus, the State could not confiscate Kimery's vehicle without a showing that he possessed a controlled substance. The criminal offense is therefore subsumed by the forfeiture statute and does not require proof of an element that is not required by the forfeiture action.

(*Ursery*, 59 F.3d at 574; see also *One 1978 Piper Cherokee Aircraft*, 37 F.3d at 495; *United States* v. *Tilley* (5th Cir.1994), 18 F.3d 295, 297-98; *Oakes* v. *United States* (E.D.Wash.1994), 872 F.Supp. 817, 824; *McCaslin*, 863 F.Supp. at 1303.) The only difference between the forfeiture and criminal proceedings is the remedy sought. We therefore find that the civil forfeiture and the criminal conviction are punishments for the same offense in Kimery's case. To accept *amicus curiae's* argument that the proceedings in Kimery's case involve different elements because one deals with property and the other with people would be in essence to adopt a circular or illusory theory. (See *Oakes*, 872 F.Supp. at 824.) Moreover, the Supreme Court in *Austin* would seem to have set aside the legal fiction that the property, rather than the owner, is the offender. *Austin*, 509 U.S. at __, 125 L.Ed.2d at 501, 113 S.Ct. at 2808; see also *McCaslin*, 863 F.Supp. 1299; *Tilley*, 18 F.3d at 297; *United States* v. *One Parcel of Real Estate Located at Rural Route 9, LaHarp, Illinois* (C.D.Ill.1995), 900 F.Supp. 1032, 1037.

Because the double jeopardy clause is not implicated in the cases of Turner or P.S., the remainder of our discussion regarding double jeopardy will be limited solely to defendant Kimery.

2. Punishment

The Supreme Court has long recognized that double jeopardy does not preclude the imposition of both a criminal and a civil sanction with respect to the same act or omission, provided that the civil sanction does not constitute punishment for double jeopardy purposes. (See *Helvering*, 303 U.S. at 398-99, 82 L.Ed. at 921, 58 S.Ct.

at 633; *United States ex rel. Marcus* v. *Hess* (1943), 317 U.S. 537, 548-52, 87 L.Ed. 443, 451-54, 63 S.Ct. 379, 386-88; *One Lot Emerald Cut Stones* v. *United States* (1972), 409 U.S. 232, 235-37, 34 L.Ed.2d 438, 442-43, 93 S.Ct. 489, 492-93; *United States* v. *One Assortment of 89 Firearms* (1984), 465 U.S. 354, 361-66, 79 L.Ed.2d 361, 367-71, 104 S.Ct. 1099, 1104-07.) In resolving the question presented in these appeals, we therefore need to determine whether the forfeiture proceedings in question constitute punishment within the meaning of the double jeopardy clause. Three recent United States Supreme Court opinions guide our analysis.

In *Halper*, the Court considered whether and under what circumstances a civil penalty may constitute "punishment" for double jeopardy purposes. (*Halper*, 490 U.S. at 436, 104 L.Ed.2d at 494, 109 S.Ct. at 1895.) In resolving the issue, the Court first stated that the labels "criminal" and "civil" were not controlling when determining whether a sanction constituted "punishment" for double jeopardy purposes. "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." (*Halper*, 490 U.S. at 447, 104 L.Ed.2d at 501, 109 S.Ct. at 1901.) The Court also noted that it was the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated. (*Halper*, 490 U.S. at 447 n. 7, 104 L.Ed.2d at 501 n. 7, 109 S.Ct. at 1901 n. 7.) Applying these principles, the Court determined that "a civil sanction that cannot fairly be said solely to serve a

remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." (*Halper*, 490 U.S. at 448, 104 L.Ed.2d at 502, 109 S.Ct. at 1902.) The Court therefore held that the double jeopardy clause barred a defendant who had already been punished from being subjected to an additional civil sanction to the extent that the second sanction could not be characterized as solely remedial but, rather, at least in part, as a deterrent or retribution. *Halper*, 490 U.S. at 448-49, 104 L.Ed.2d at 502, 109 S.Ct. at 1902.

The *Halper* Court then went on to announce a rule in cases, such as the one before it, where a fixed penalty provision subjects an offender to a disproportionate sanction when compared to the damages he has caused: "Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." (*Halper*, 490 U.S. at 449, 104 L.Ed.2d at 502, 109 S.Ct. at 1902.) The Court finally noted that its decision did not preclude the State from seeking the full range of civil penalties against a defendant who has previously not been punished for the same conduct nor did it preclude the imposition of the full range of civil and criminal penalties in the same proceeding. *Halper*, 490 U.S. at 450, 104 L.Ed.2d at 503, 109 S.Ct. at 1903.

Following the decision in *Halper*, the Supreme Court decided *Austin*. At issue in *Austin* was whether the

excessive fines clause of the eighth amendment applied to forfeitures for property under sections 881(a)(4) and (a)(7) of the Federal controlled substances forfeiture act. (21 U.S.C.A. ss 881(a)(4), (a)(7) (West 1981 & Supp. 1994).) These provisions provide for the forfeitures of, respectively, conveyances and real property used, or intended to be used, to facilitate the commission of certain drug-related crimes. Because the eighth amendment limits the government's power to punish, the central question before the Court was whether statutory forfeitures under those provisions were punishment.

After tracing the historical development of civil forfeiture provisions, the Court observed that historically in rem forfeitures were understood at least in part as punishment. (*Austin*, 590 U.S. at __, 125 L.Ed.2d at 503, 113 S.Ct. at 2810.) The Court then considered whether forfeitures under sections 881(a)(4) and (a)(7) were properly considered punishment today. The Court found nothing in the provisions at issue or there legislative history that contradicted the historical understanding of forfeitures as punishment. "In light of the historical understanding of forfeiture as punishment, the clear focus of ss 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, [the Court] [could not] conclude that forfeiture under ss 881(a)(4) and (a)(7) serve[d] solely a remedial purpose." (*Austin*, 509 U.S. at __, 125 L.Ed.2d at 505, 113 S.Ct. at 2812.) The Court therefore stated that forfeiture under the provisions at issue constituted punishment. In reaching this determination, the Court rejected the government's arguments that the provisions at issue were remedial because (1) they removed the instruments of a drug transaction and

(2) the forfeited assets served to compensate the government for the costs of undertaking law enforcement activities. The Court also stated that even if the forfeiture did serve some remedial purpose, the government's argument still failed because a civil sanction that cannot be found to serve solely a remedial purpose constituted punishment. *Austin*, 509 U.S. at __, 125 L.Ed.2d at 505, 113 S.Ct. at 2812.

Finally, the Court in *Kurth Ranch* held that a tax on the possession of illegal drugs assessed after the imposition of a criminal penalty for the same conduct violated the double jeopardy clause. Citing *Halper* and *Austin*, the Court began by noting that criminal fines, civil penalties, civil forfeitures, and taxes all generate government revenues, impose fiscal burdens on individuals, deter certain behavior, and are subject to constitutional constraints. (*Kurth Ranch*, 511 U.S. at __, 128 L.Ed.2d at 778, 114 S.Ct. at 1945.) The Court recognized that taxes are generally motivated by revenue-raising rather than punitive purposes. The Court acknowledged, however, that at times a tax may lose its usual character and approach punishment. The Court characterized the tax statute at issue as punitive because of its unusual features and, thus, found the tax to be punishment for purposes of the double jeopardy clause. *Kurth Ranch*, 511 U.S. at __, 128 L.Ed.2d at 781, 114 S.Ct. at 1948.

Based on the above authority, we need to determine whether the forfeiture of Kimery's automobile served, in part, to punish him. If so, the forfeiture will be considered punishment for purposes of the double jeopardy clause. In light of *Austin* and *Kurth Ranch*, we find that the forfeiture of Kimery's car, sought under the provisions of the Forfeiture Act, constitute punishment for double jeopardy purposes.

A review of the Forfeiture Act establishes that it is patterned after the Federal statute and should be interpreted consistently with the Federal statute. Section 2 of the Forfeiture Act provides:

> "The General Assembly further finds that the federal narcotics civil forfeiture statute upon which this Act is based has been very successful in deterring the use and distribution of controlled substances within this State and throughout the country. It is therefore the intent of the General Assembly that the forfeiture provisions of this Act be construed in light of the federal forfeiture provisions contained in 21 U.S.C. 881 as interpreted by the federal courts, except to the extent that the provisions of this Act expressly differ therefrom." (725 ILCS 150/2 (West 1992).)

We know from *Austin* that forfeitures under sections 881(a)(4) and (a)(7) of the Federal controlled substances forfeiture act are considered punishment. The forfeiture of Kimery's car was brought under the provisions of the Forfeiture Act relating to forfeitures of vehicles used to facilitate the sale, receipt, possession, and concealment of a controlled substance. (Ill.Rev.Stat.1991, ch. 56 1/2, par. 1505(a)(3).) This provision is similar in all material aspects to section 881(a)(4) of the Federal forfeiture act. In fact, this court has previously noted the similarity between section 505(a)(3) of the Forfeiture Act and section 881(a)(4) of the Federal act. (See *1988 Mercury Cougar*, 154 Ill.2d at 33.) Because the legislature has mandated that the provisions of the Forfeiture Act be interpreted consistently with the Federal forfeiture act, we must conclude that the forfeiture of Kimery's car constituted punishment for double jeopardy purposes.

Like 21 U.S.C. §881 (1988), the objective of the Forfeiture Act is to deter criminal behavior. Section 2 of the

Forfeiture Act specifically states that the forfeiture of property used or intended to be used to facilitate the manufacture, sale transportation, distribution, possession or use of controlled substances will have a "significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State." (725 ILCS 150/2 (West 1992).) Moreover, application of the Forfeiture Act's provisions are not triggered unless there is a corresponding criminal violation. Additionally, both the Federal statute and the Forfeiture Act here provide defenses for innocent offenders or interest holders in the property forfeited. (See 21 U.S.C.A. §881(a)(4)(C) (West 1981 & Supp.1994); 725 ILCS 150/8 (West 1992).) The presence of the innocent-owner defense demonstrates the Forfeiture Act's focus on the culpability of the owner and further supports our finding that the forfeiture at issue constitutes punishment. Because of the similarities between the forfeiture provisions at issue in here and in *Austin*, we conclude that the forfeiture of Kimery's car constitutes punishment for double jeopardy purposes. Because of our disposition in the cases of P.S. and Turner, it is not necessary for us to decide whether forfeiture of proceeds of a drug transaction constitutes punishment for double jeopardy purposes.

The State attempts to avoid our conclusion that the forfeiture at issue constitutes punishment by raising several arguments, all of which we reject. First, the State argues that we should follow our decision in *1988 Mercury Cougar* which mandates a different result from what is reached here. The State also contends that neither *Austin* nor *Kurth Ranch* requires this court to deviate from *1988 Mercury Cougar*. In *1988 Mercury Cougar*, this court held that the double jeopardy clause

did not bar the government from bringing a civil action for forfeiture of an instrumentality of crime subsequent to a criminal conviction for the same offense. This court reasoned that the forfeiture of an instrumentality of a crime would not violate the double jeopardy clause because the sanction in a forfeiture proceeding is not imposed upon a person, but rather is directed at the property. Moreover, this court found that the forfeiture of an instrumentality of crime is always remedial. (*1988 Mercury Cougar*, 154 Ill.2d at 35.) While our decision in *1988 Mercury Cougar* may have been valid at the time, the Supreme Court's decisions in *Austin* and *Kurth Ranch* have invalidated this court's distinction for holding that civil forfeitures are not punishment. (See *Austin*, 509 U.S. at __ n. 9, 125 L.Ed.2d at 501 n. 9, 113 S.Ct. at 2808 n. 9 (noting that forfeiture proceedings historically have been understood as imposing punishment despite their *in rem* nature); see also *State* v. *1979 Cadillac Deville* (La.App.1994), 632 So.2d 1221, 1225 n. 3; *McCaslin*, 863 F.Supp. at 1302.) To the extent that *1988 Mercury Cougar* is inconsistent with the opinion in this case, it is overruled.

The State's attempt to distinguish *Austin* by arguing that *Austin* only applies in the eighth amendment context is also unpersuasive. In resolving whether the eighth amendment protections applied in that case, the *Austin* Court found it necessary to determine whether the forfeiture at issue constituted punishment. Only after making this determination did the Court then determine whether the eighth amendment protections applied. Moreover, *Austin* used the "solely remedial" test employed by *Halper*, a double jeopardy case, in resolving the issue before the Court. A fair reading of *Austin* is

that it resolves the "punishment" issue with respect to forfeitures for double jeopardy purposes. Moreover, the majority of courts from other jurisdictions have held that the *Austin* analysis applies in the fifth amendment context. See, e.g., *United States* v. *Baird* (3d Cir.1995), 63 F.3d 1213, 1216, *petition for cert. filed* (U.S. September 17, 1995), No. 95-630, 64 U.S.L.W. 3318; *Ursery*, 59 F.3d at 573; *1978 Piper Cherokee Aircraft*, 37 F.3d at 495; *United States Currency*, 33 F.3d at 1219; *Oakes*, 872 F.Supp. at 826; *McCaslin*, 863 F.Supp. at 1302; *1979 Cadillac Deville*, 632 So.2d at 1228; *Fant* v. *State* (Tex. Ct.App.1994), 881 S.W.2d 830, 834; *State* v. *Clark* (1994), 124 Wash.2d 90, 99-100, 875 P.2d 613, 617.

We also find that the State's argument that *Kurth Ranch* does not apply to the forfeiture proceedings because it involved a tax is equally unavailing. Although *Kurth Ranch* involved a tax on drugs, the decision provides guidance in dealing with double jeopardy questions in the civil forfeiture context. If the tax in *Kurth Ranch* could run afoul of the double jeopardy clause, then a civil forfeiture, which is readily characterized as a sanction for criminal conduct, might also run afoul of the clause.

Finally, the State argues that if this court determines that the forfeiture constituted punishment we need to apply the proportionality test of *Halper* to determine the fairness of the forfeiture. We do not believe, however, that such a test is applicable in the present case. *Austin* appears to have specifically rejected a case-by-case approach, opting for a more categorical approach to forfeitures of conveyances used to facilitate the transportation etc. of contraband. In *Austin*, the Supreme Court found that the "rational-relation" test of *Halper* was inapplicable in the forfeiture setting there, and instead

looked to the purpose behind the forfeiture statute itself. Further, *Austin* distinguished the civil sanction at issue in *Halper* from the forfeiture at issue before it by noting that "*Halper* involved a small, fixed-penalty provision, which 'in the ordinary case . . . can be said to do no more than make the Government whole.' " (*Austin*, 509 U.S. at __ n. 14, 125 L.Ed.2d at 505 n. 14, 113 S.Ct. at 2812 n. 14, quoting *Halper*, 490 U.S. at 449, 104 L.Ed.2d at 502, 109 S.Ct. at 1902.) In contrast, the Court in *Austin* found that the value of the conveyance and real property forfeitable under sections 881(a)(4) and (a)(7) varied so dramatically that any relationship between the government's actual costs and the amount of the sanction was merely coincidental. Moreover, *Halper* involved a civil penalty whose remedial purpose was to compensate the government for the fraudulent acts perpetrated on it, while the purpose of the forfeitures at issue in *Austin* was to remove an instrumentality of a drug transaction. The categorical approach of *Austin* therefore would appear to obviate the need for this court to compare the value of the forfeited property to the government's damages and costs in this case. See *People* v. *Perez* (5th Cir. November 21, 1995), No. 94-60788, slip op. at 6; but see *Johnson* v. *State* (Tex.Ct.App.1994), 882 S.W.2d 17, 19-20; *State* v. *Borromeo* (4th Cir.1993), 1 F.3d 219, 220-21.

3. Separate Proceedings

Because the double jeopardy clause prohibits punishing a defendant more than once in separate proceedings, we must also determine whether the civil forfeiture proceeding in the instant case was separate from the criminal proceeding initiated against Kimery. The State argues

that the forfeiture and criminal proceedings against Kimery were not separate, but rather were part of a single, coordinated prosecution of Kimery. As a result, the State contends that the double jeopardy clause was not violated. In support of its argument, the State cites *United States* v. *Millan* (2d Cir.1993), 2 F.3d 17, and *United States* v. *One Single Family Residence Located at 18755 North Bay Road, Miami* (11th Cir.1994), 13 F.3d 1493, each decided prior to *Kurth Ranch* and holding that civil forfeiture and criminal cases pursued as part of a coordinated effort amounted to a single proceeding for double jeopardy purposes.

The Supreme Court has made clear that the government may "seek[ ] and obtain [ ] both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding," provided that the total punishment does not exceed that authorized by the legislature. (*Halper*, 490 U.S. at 450, 104 L.Ed.2d at 503, 109 S.Ct. at 1903; see also *Missouri* v. *Hunter* (1983), 459 U.S. 359, 366, 74 L.Ed.2d 535, 542, 103 S.Ct. 673, 678.) Courts have employed varying approaches to determine when a civil forfeiture action and a parallel criminal prosecution can properly be considered components of a single proceeding so that the double jeopardy clause is not implicated. The courts have reached different results.

The Second and Eleventh Circuits have held that parallel criminal and civil forfeiture actions constitute a single proceeding which does not implicate double jeopardy concerns. (See *Millan*, 2 F.3d at 20-21; *One Single Family Residence*, 13 F.3d at 1499.) In deciding that parallel civil and criminal actions constitute a single proceeding, the Second Circuit in *Millan* relied on the following factors: (1) warrants for the civil seizures and

criminal arrests were issued on the same day, by the same judge, and were based on the same affidavit; (2) a stipulation entered into by the government and defendants included both the property seized in the civil forfeiture and named in the criminal indictment; (3) the forfeiture complaint incorporated the criminal indictment; and (4) the defendants were aware of the criminal charges against them when they entered into the stipulation. (*Millan*, 2 F.3d at 20.) In resolving the issue, the court also stated that it did not find dispositive the fact that the civil and criminal actions were filed separately with their own docket number, noting that under the Federal system civil and criminal suits had to be filed and docketed separately. "Therefore, courts must look past the procedural requirements and examine the essence of the actions at hand by determining when, how, and why the civil and criminal actions were initiated." (*Millan*, 2 F.3d at 20.) The court further noted that one of the Supreme Court's concerns in *Halper* was that the government might act abusively in seeking a second punishment when it was dissatisfied with the punishment levied in the first action. The court in *Millan* noted, however, that such a concern was not present in that case because the civil and criminal actions were contemporaneous, not consecutive, and the parties were fully aware that the government intended to pursue all criminal and civil remedies against them regardless of the outcome of the proceeding. *Millan*, 2 F.3d at 20; accord *One Single Family Residence*, 13 F.3d at 1499 (relying in part on *Millan* in finding that the double jeopardy clause was not implicated when the government pursued simultaneous criminal and civil sanctions against a defendant within a single, coordinated prosecution); *United States* v. *Smith*

(N.D.Ala.1995), 874 F.Supp. 347, 350 (following *Single Family Residence*).

In contrast, other circuits have rejected the view expressed in *Millan* and have instead concluded that civil forfeiture actions and parallel criminal prosecutions constitute separate proceedings for double jeopardy purposes. (See *United States* v. *Torres* (7th Cir.1994), 28 F.3d 1463, 1465; *United States Currency*, 33 F.3d at 1216-18; see also Ursery, 59 F.3d at 575.) In reaching the above conclusion, the Ninth Circuit in *United States Currency* stated:

"We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments, constitute the same 'proceeding.' In ordinary legal parlance, such actions are often characterized as 'parallel proceedings,' but not as the 'same proceeding.' A forfeiture case and a criminal prosecution would constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time." (Emphasis in original.) (*United States Currency*, 33 F.3d at 1216.)

Although both proceedings resulted from the same violation of law, the court stated that it was unwilling to "whitewash the double jeopardy violation in this case by affording constitutional significance to the label of 'single, coordinated prosecution.' " *United States Currency*, 33 F.3d at 1217.

The apparent inconsistencies between the Ninth and Second Circuits' approaches may depend more on factual and procedural differences in the cases rather than a fundamental difference in double jeopardy analysis. How-

ever, the Ninth Circuit's rationale in *United States Currency* does suggest that parallel civil and criminal proceedings will always violate the double jeopardy clause (see *United States Currency*, 33 F.3d at 1216 ("A forfeiture case and a criminal prosecution would constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time" (emphasis in original)); see also *Ursery*, 59 F.3d at 575), while under the Second Circuit's approach, parallel proceedings, although literally separate, may under certain circumstances constitute a single proceeding for double jeopardy purposes. The Second Circuit's approach, however, may be undercut by *Kurth Ranch* in which the civil and criminal prosecutions were filed contemporaneously, but were considered separate proceedings by the Supreme Court. See *Kurth Ranch*, 511 U.S. at __ n. 21, 128 L.Ed.2d at 780 n. 21, 114 S.Ct. at 1947 n. 21 (remarking that the case involved separate sanctions imposed in successive proceedings); see also *McCaslin*, 863 F.Supp. at 1304; 1 D. Smith, Prosecution & Defenses of Forfeiture Cases §12.10, at 12-141 n. 33 (1995).

In the present case, we find that in so far as the existence of a "single coordinated proceeding" would satisfy the requirements of the double jeopardy clause, the facts in the present case fail to reveal such a single, coordinated proceeding. (*Ursery*, 59 F.3d at 575.) Here, the State brought and tried the civil forfeiture action completely separately from the criminal prosecution. The actions were initiated and docketed separately. The State sought to try the actions at different times and before different judges which resulted in separate judgments against defendant. The civil forfeiture complaint did not incorporate the criminal indictment, nor did it refer to

the indictment. Moreover, the cases were handled by different attorneys from the State's Attorney's office, and there is no indication in the record of any communication between the prosecuting authorities in the forfeiture and criminal cases. The only coinciding factor between the forfeiture and criminal proceedings was that they were based on the same offense. This factor alone, however, is insufficient to support a determination that the actions in question were part of a single proceeding, even under the Second Circuit's analysis. Moreover, we find that the fact the State instituted and proceeded with the forfeiture action against defendant before it knew the outcome of the criminal proceedings is also not outcome determinative. (See *McCaslin*, 863 F.Supp. at 1305 (asserting that the prosecutor's state of mind cannot determine whether a defendant has been placed in double jeopardy).) Based on the foregoing discussion, we conclude that the forfeiture proceeding was separate from the criminal proceeding and not part of a single, coordinated procedure. See *1979 Cadillac Deville*, 632 So.2d at 1229; *Oakes*, 872 F.Supp. at 824-25.

Because we have found double jeopardy applies in Kimery's case, we hold that further prosecution of Kimery following the forfeiture of his vehicle was prohibited by the double jeopardy clause.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the appellate court in Turner's case, cause No. 78944, and remand to the circuit court for further proceedings consistent with this opinion. We also reverse the judgment of the appellate court in cause No. 78910 with

respect to P.S. and remand to the circuit court for further proceedings consistent with this opinion. With respect to Kimery in cause No. 78910, we affirm the judgment of the appellate court.

No. 78910-Appellate court judgment affirmed in part and reversed in part; cause remanded.

No. 78944-Appellate court judgment reversed; cause remanded.

JUSTICE HARRISON took no part in the consideration or decision of this case.

APPENDIX B

269 Ill.App.3d 907, 207 Ill.Dec. 279

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
George TOWNS, Defendant-Appellant.
The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Roderick TURNER, Defendant-Appellant.

Nos. 2-93-1376, 2-94-0111.
Appellate Court of Illinois,
Second District.

Feb. 24, 1995.

Justice BOWMAN delivered the opinion of the court:

The above-titled cases have been consolidated for decision, each having raised a double jeopardy issue premised on similar facts and circumstances. Both appeals are taken pursuant to Supreme Court Rule 604(f), which permits the appeal to the appellate court of the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy. 145 Ill. 2d R. 604(f).

The substantive facts in both cases are undisputed. In case No. 2-94-0111, defendant Roderick Turner was charged by grand jury indictment on January 5, 1993, with unlawful possession of a controlled substance (720 ILCS 570/402(a)(2) (West 1992)), unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2) (West 1992)), and unlawful possession of a controlled substance without a tax stamp (35 ILCS 520/10 (West 1992)). At the time of Turner's arrest on

these charges, the State seized $2,165 in cash. The State then sought forfeiture of this sum under the Illinois Controlled Substances Act (Controlled Substances Act) (720 ILCS 570/505 (West 1992)) and the Drug Asset Forfeiture Procedure Act (Forfeiture Act) (725 ILCS 150/1 *et seq.* (West 1992)). Turner filed a claim contesting the forfeiture and, on August 20, 1993, a hearing was held. Following the hearing, the court ordered the cash forfeited. No appeal was taken from the forfeiture.

Following the forfeiture, Turner moved to dismiss the criminal case on grounds of double jeopardy. (725 ILCS 5/114-1(a)(2) (West 1992); U.S. Const., amend. V; Ill. Const. 1970, art. I, §10.) The motion alleged that the asset forfeiture constituted punishment for double jeopardy purposes and any subsequent prosecution for the same offense violated the constitutional protection against double jeopardy. The motion to dismiss was denied, and this timely appeal followed.

In case No. 2-93-1376, defendant George Towns was charged with unlawful possession of a controlled substance (720 ILCS 570/401(c)(2) (West 1992)), unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/402(c) (West 1992)), and unlawful possession of a controlled substance without a tax stamp (35 ILCS 520/10 (West 1992)). The State sought forfeiture of $411 in cash that was seized from Towns at the time of his arrest. Towns did not file a claim to the money, and it was ordered forfeited nonjudicially under section 6 of the Forfeiture Act (725 ILCS 150/6 (West 1992)).

The criminal case proceeded to a bench trial, and Towns was found guilty of possession of a controlled substance and not guilty of the other two charges. Prior to

sentencing, Towns, like Turner, filed a motion to dismiss on grounds of double jeopardy. (725 ILCS 5/114-1(a)(2); U.S. Const., amend. V; Ill. Const. 1970, art. I, §10.) The motion contained the same allegations as those made in Turner's motion. The trial court denied the motion to dismiss, and this timely appeal followed.

On appeal, defendants contend that a reading of the Supreme Court's recent holding in *Austin v. United States* (1993), 509 U.S. __, 125 L. Ed. 2d 488, 113 S. Ct. 2801, leads inescapably to the conclusion that asset forfeitures under the Illinois Controlled Substances Act (720 ILCS 570/100 *et seq.* (West 1992)) constitute punishment for double jeopardy purposes. Defendants acknowledge that the Illinois Supreme Court recently confronted this issue in *People v. 1988 Mercury Cougar* (1992), 154 Ill. 2d 27, where it held that a civil forfeiture following a criminal prosecution for the same offense does not violate the double jeopardy clause. Defendants, however, maintain that because *Austin* and its progeny establish that forfeitures under a nearly identical Federal statute are punishment, *Mercury Cougar's* holding is no longer valid.

In response, the State argues that (1) *Austin* is inapplicable to the present cases because its conclusion that asset forfeitures are punishment arose in the context of an eighth amendment claim rather than a fifth amendment double jeopardy claim; and (2) even if *Austin* is applicable to the present cases, double jeopardy is not violated because the asset forfeitures and criminal charges against defendants were part of a single, coordinated prosecution. Additionally, with respect to defendant Towns, the State asserts that jeopardy never attached in the forfeiture proceeding because Towns failed to make a claim to the money which the State

sought to forfeit. As a result, the State asserts, Towns was never in jeopardy in the forfeiture case and his criminal prosecution did not violate double jeopardy.

The double jeopardy clause of the fifth amendment to the United States Constitution reads: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." (U.S. Const., amend. V; see also Ill. Const. 1970, art. 1, §10 ("No person shall be * * * twice put in jeopardy for the same offense").) The double jeopardy clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense when sought in separate proceedings. (See, *e.g.*, *United States v. Halper* (1989), 490 U.S. 435, 440, 104 L. Ed. 2d 487, 496, 109 S. Ct. 1892, 1897; *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072, 2076.) The third of these protections—the subject of this appeal—is deeply ingrained in the Anglo-American system of jurisprudence. (*Green v. United States* (1957), 355 U.S. 184, 187, 2 L. Ed. 2d 199, 204, 78 S. Ct. 221, 223.) "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times." *Bartkus v. Illinois* (1959), 359 U.S. 121, 151-52, 3 L. Ed. 2d 684, 706, 79 S. Ct. 676, 696 (Black, J., dissenting).

The fundamental purpose of the double jeopardy clause is to protect an accused from being forced to defend against repeated attempts to exact one or more punishments for the same offense and applies with equal force whether the first prosecution results in a conviction or an acquittal. (*Abbate v. United States* (1959), 359 U.S.

187, 198-99, 3 L. Ed. 2d 729, 736, 79 S. Ct. 666, 672-73; *United States v. $405,089.23 U.S. Currency* (9th Cir. 1994), 33 F. 3d 1210, 1215.) The underlying principle of the protection against double jeopardy is that "a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts." *Abbate v. United States* (1959), 359 U.S. 187, 198-99, 3 L. Ed. 2d 729, 736, 79 S. Ct. 666, 673, quoted in *U.S. Currency*, 33 F.3d at 1215.

In the present case, to determine whether the State's attempt to prosecute criminally defendants following the forfeitures contravenes the double jeopardy clause, we consider two questions: (1) did the civil forfeiture under the Act amount to a "punishment" for double jeopardy purposes?; and (2) was there a separate prosecution in each case? The criminal prosecutions in the present cases violate the double jeopardy clause only if we answer both questions in the affirmative. See *U.S. Currency*, 33 F.3d at 1216.

In recent cases, the United States Supreme Court has determined that a civil penalty constitutes punishment for double jeopardy purposes, despite its civil label, when the sanction, as applied, serves the goals of punishment, retribution or deterrence, rather than remediation. In *United States v. Halper* (1989), 490 U.S. 437, 104 L. Ed. 2d 487, 109 S. Ct. 1892, the Supreme Court stated: "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." (Emphasis added.) *Halper*, 490 U.S. at 448, 104 L. Ed. 2d at 502, 109 S. Ct. at 1902.

The *Halper* court's conclusion that a civil sanction which serves retributive or deterrent purposes constitutes a punishment regardless of whether it also has a remedial purpose was reaffirmed in *Austin v. United States* (1993), 509 U.S. __, 125 L. Ed. 2d 488, 113 S. Ct. 2801. The issue in *Austin* was whether the excessive fines clause of the eighth amendment applied to forfeitures under 21 U.S.C. §881 (19__), the Federal controlled substance forfeiture statute (21 U.S.C.A. §881 (West 1981 & Supp. 1994)). Because the eighth amendment limits the government's power to punish, the central question before the court was whether the statutory forfeiture was punishment.

After tracing the long history of forfeitures in England and the United States, the court determined that a civil forfeiture stemming from a drug offense was a criminal punishment. The court observed that its decisions "consistently ha[ve] recognized that forfeiture serves, at least in part, to punish the owner" of the forfeited property. (*Austin*, 509 U.S. at __, 125 L. Ed. 2d at 503, 113 S. Ct. at 2810 citing *Calero-Toledo v. Pearson Yacht Leasing Co.* (1974), 416 U.S. 663, 40 L. Ed. 2d 452, 94 S. Ct. 2080; *Goldsmith-Grant Co. v. United States* (1921), 254 U.S. 505, 65 L. Ed. 376, 41 S. Ct. 189; *Dobbins v. United States* (1878), 96 U.S. 395, 24 L. Ed. 637; *Peisch v. Ware* (1808), 8 U.S. (4 Cranch) 347, 2 L. Ed. 643.) The Court applied the *Halper* test of whether the statute serves at least *in part* to punish and noted that, even though it might have some remedial purpose, the statute was tied to the commission of a drug offense and focused on the culpability of the owner of the property to be forfeited. (*Austin*, 509 U.S. at __, 125 L. Ed. 2d at 503-05, 113 S. Ct. at 2810-11.) The court further noted that a forfeiture

of property is a fixed penalty which need not have any correlation to the damages suffered by society or to the costs of law enforcement. (*Austin*, 509 U.S. at __, 125 L. Ed. 2d at 505, 113 S. Ct. at 2812.) In view of the statute's objectives to deter and to punish, the court stated: "we cannot conclude that forfeiture * * * serves solely a remedial purpose" and held that forfeiture was a punishment, subject to the limitations of the eighth amendment's excessive fines clause. *Austin*, 509 U.S. at __, 125 L. Ed. 2d at 505, 113 S. Ct. at 2812.

Most recently, in *Department of Revenue v. Kurth Ranch* (1994), 511 U.S. __, 128 L. Ed. 2d 767, 114 S. Ct. 1937, the Supreme Court held that a financial exaction in the form of a tax imposed only on persons arrested for drug offenses can count as a separate jeopardy. The issue in *Kurth Ranch* was whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct violates the double jeopardy clause. Relying on *Halper* and *Austin*, the court concluded the tax in issue "possessed * * * an unmistakable punitive character" and held that it constituted punishment for purposes of the double jeopardy clause. *Kurth Ranch*, 511 U.S. at __, 128 L. Ed. 2d at 781, 114 S. Ct. at 1948.

Kurth Ranch also concluded that a financial exaction, such as a tax imposed only on persons arrested for drug offenses, can count as a separate jeopardy even where it is coordinated with a criminal prosecution. In *Kurth Ranch*, six members of the Kurth family were arrested for cultivating marijuana on their farm. The State of Montana pursued criminal charges, civil forfeiture proceedings, and a tax collection proceeding against the Kurths; additionally, there was a bankruptcy proceeding

initiated by the Kurths themselves. The Court characterized these as "four separate legal proceedings." (*Kurth Ranch*, 511 U.S. at __, 128 L. Ed. 2d at 774, 114 S. Ct. at 1942.) Although the three State-initiated proceedings were based on the same conduct, were pending at the same time, and were part of a coordinated attempt to close down the Kurths' marijuana operation, the court treated them as separate proceedings for double jeopardy purposes. Finally, the court held that the exaction of the tax after a criminal penalty had already been imposed was "the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offence,' " despite the fact that the proceedings were part of a single prosecutorial effort. *Kurth Ranch*, 511 U.S. at __, 128 L. Ed. 2d at 782, 114 S. Ct. at 1948.

Several Federal and State courts have now followed the Supreme Court's lead in concluding that a criminal prosecution brought separately from a civil forfeiture proceeding will be barred under the double jeopardy clause where the civil sanction is deemed to be punishment. *United States v. $405,089.23 U.S. Currency* (9th Cir. 1994), 33 F.3d 1210, is particularly instructive. There, the government brought a criminal prosecution against a number of defendants along with a separate but parallel civil forfeiture action under 21 U.S.C. §881 (19__) (21 U.S.C.A. §881 (West 1981 & Supp. 1994)). The forfeiture action was instituted on June 17, 1991, five days after a grand jury issued an indictment in the criminal case. The court then stayed the forfeiture action pending the outcome of the criminal prosecution. On March 27, 1992, the criminal case terminated with the conviction of all defendants. The district court then

granted summary judgment to the government in the forfeiture case. The defendants appealed, claiming that the civil forfeiture following their criminal convictions for the same offense violated the fifth amendment's double jeopardy clause. (*U.S. Currency*, 33 F.3d at 1214-15.) In addressing the defendants' claims, United States Court of Appeals for the Ninth Circuit considered (1) whether civil forfeiture under the Federal statutes constituted punishment; and (2) whether the civil forfeiture and criminal prosecution were separate proceedings.

The court answered the first question in the affirmative, relying on *Halper* and *Austin*. While acknowledging that *Austin* arose in the context of an eighth amendment claim, the ninth circuit stated that "the only fair reading of the Court's decision in *Austin* is that it resolves the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause." (*U.S. Currency*, 33 F.3d at 1219.) Because the statutes in issue served, at least in part, retributive and deterrent functions (*Halper*, 490 U.S. at 448, 104 L. Ed. 2d at 502, 109 S. Ct. at 1902), the court found the conclusion "inescapable" that civil forfeitures constitute punishment under the fifth amendment. *U.S. Currency*, 33 F.3d at 1219.

The court also concluded that the civil forfeiture and criminal prosecution were separate proceedings. In so doing, it rejected the government's argument that although the civil and criminal proceedings are technically separate, they were part of a single, coordinated prosecution and should be treated as one. The court stated:

> "We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved

> by separate judgments, constitute the same 'proceeding.' * * * We are not willing to whitewash the double jeopardy violation in this case by affording constitutional significance to the label of 'single, coordinated prosecution.' " *U.S. Currency*, 33 F.3d at 1216-17.

The conclusion of the ninth circuit in *U.S. Currency* is consistent with the decisions of the overwhelming majority of courts across the country which have confronted the issue. (See, *e.g.*, *United States v. Torres* (7th Cir. 1994), 28 F.3d 1463; *Clifft v. Indiana Department of State Revenue* (Ind. Tx. Ct. 1994), 641 N.E.2d 682 (following *Kurth Ranch*; controlled substances tax was punishment for double jeopardy purposes and could not be collected from defendant who had pleaded guilty to offense); *State v. 1979 Cadillac DeVille* (La. Ct. App. 1994), 632 So.2d 1221 (forfeiture of automobile as derivative contraband violated double jeopardy clause even though statute served some partly remedial purpose, where forfeiture proceeding was separate from criminal proceeding (dissent filed)), *writ granted* (1994), 642 So. 2d 1302; *New Mexico Taxation & Revenue Department v. Whitener* (1993), 117 N.M. 130, 869 P.2d 829 (drug tax was punishment which violated prohibition against double jeopardy where defendant had been convicted of drug offense and State failed to show tax was proportional and remedial (dissent filed)), *cert. granted* (1994), 117 N.M. 328, 871 P.2d 984; *Fant v. State* (Tex. Ct. App. 1994), 881 S.W.2d 830 (civil forfeiture was punishment even though partly remedial, barring further criminal prosecution (dissent filed), rejecting *Johnson v. State* (Tex. Ct. App. 1994), 882 S.W.2d 17, *review granted*, which held forfeiture of personal property was not overwhelmingly disproportionate penalty but instead was remedial); *State v. Clark* (1994), 124 Wash. 2d 90, 875

P.2d 613 (civil forfeiture of home and motor home was punishment under excessive fines clause but double jeopardy issue was not reached).

In view of the above-cited authorities, particularly *Halper*, *Austin*, *Kurth Ranch*, and *U.S. Currency*, we conclude that the forfeitures in the instant cases constituted punishments for double jeopardy purposes. A review of our State's Drug Asset Forfeiture Procedure Act (725 ILCS 150/1 *et seq.* (West 1992)) shows that it is patterned after 21 U.S.C. §881 (19__) and should be interpreted consistently with the Federal statute. Section 2 of the Forfeiture Act states:

> "The General Assembly further finds that the federal narcotics civil forfeiture statute upon which this Act is based has been very successful in deterring the use and distribution of controlled substances within this State and throughout the country. It is therefore the intent of the General Assembly that the forfeiture provisions of this Act be construed in light of the federal forfeiture provisions contained in 21 U.S.C. 881 as interpreted by the federal courts, except to the extent that the provisions of this Act expressly differ therefrom." 725 ILCS 150/2 (West 1992).

Like 21 U.S.C. §881 (19__), the objective of the Forfeiture Act is to deter criminal behavior, and its application is triggered by a criminal violation. Both the Federal statute and the Forfeiture Act provide defenses for innocent owners or interest holders in the property to be forfeited. (21 U.S.C.A. §881(a)(4)(C) (West 1981 & Supp. 1994); 725 ILCS 150/8 (West 1992).) The innocent owner defense operates to ensure that owners of property who lacked knowledge of the drug activity are not punished by forfeiture. (See *United States v. Certain Real Property & Premises, known as 890 Noyac Road, Noyac, N.Y.* (2d

Cir. 1991), 945 F.2d 1252; *People v. 1991 Chevrolet Camaro, VIN 1GFP23E9ML117842* (1993), 251 Ill. App. 3d 382). The presence of the innocent owner defense demonstrates the Forfeiture Act's focus on the culpability of the owner and belies the State's contention that it is unmotivated by any retributive purpose. (*U.S. Currency*, 33 F.3d at 1221; see also *Clark*, 124 Wash. 2d at ___, 875 P.2d at 616.) In fact, our supreme court has recently acknowledged the fact that the Federal drug asset forfeiture statute is "very similar" to the Forfeiture Act. (See *People ex rel. Waller v. 1989 Ford F350 Truck* (1994), 162 Ill. 2d 78, 87.) In the wake of *Austin* and *Kurth Ranch*, we believe that a forfeiture under the Forfeiture Act constitutes punishment even though it may have some remedial purposes. We are, of course, aware that our conclusion is different from that reached by the supreme court in *People v. 1988 Mercury Cougar* (1992), 154 Ill. 2d 27. That case, however, was decided before *Austin* and *Kurth Ranch*, and, in light of those decisions, we are compelled to reach the opposite conclusion.

We also believe that the forfeiture proceedings were separate from the criminal proceedings in the instant cases. Multiple punishments for the same conduct may be permissible if imposed in the same proceeding, but are barred if imposed in separate proceedings. (*Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892.) The State argues that the double jeopardy clause does not apply because the civil and criminal actions were part of a single, coordinated prosecution of defendants.

In arguing that the civil and criminal proceedings comprise a single, coordinated prosecution, the State attempts to garner support from *United States v. Millan* (2d Cir. 1993), 2 F.3d 17. There arrest warrants were

issued on July 30, 1991, for approximately 40 individuals including certain members of the Bottone family. Based on the same affidavit, seizure warrants were issued pursuant to the Federal civil forfeiture statute for assets connected to illegal drug activities. On August 14, 1991, an indictment was filed against the defendants charging them with participation in a massive narcotics distribution conspiracy. The same indictment included a criminal forfeiture count for properties alleged to be facilitators of, or proceeds from, drug activity. In the meantime, Alfred Bottone, Jr., filed an administrative claim challenging the government's seizure of certain assets, including a used car business. In response, on December 26, 1991, the government filed an *in rem* civil forfeiture suit against the used car business and its associated assets. In its complaint, the government incorporated the indictment by reference and exhibit.

On October 5, 1992, a superseding indictment charged that the Bottones had obtained property in excess of $100 million from the charged narcotics violations. On January 20, 1993, the Bottones entered into a stipulation whereby the government relinquished its claim to $101,000 in several bank accounts and other assets, to enable the Bottones to pay attorney fees. In return, the Bottones relinquished any claim to $240,000 in cash and certain other seized properties. The civil *in rem* suit was then dismissed. On February 23, 1993, just before the start of the criminal trial, the Bottones filed a motion to dismiss the superseding indictment on double jeopardy grounds, claiming that under *United States v. Halper* (1989), 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892, the settlement agreement constituted punishment within the meaning of the double jeopardy clause. The district

court denied the motion, finding that the civil and criminal proceedings constituted a single proceeding. The court of appeals affirmed, holding that the civil forfeiture suit was part of a single, coordinated prosecution of persons involved in alleged criminal activity. *Millan*, 2 F.3d 17.

The *Millan* court noted that the civil and criminal warrants were issued the same day by the same judge; the stipulation involved not only the seized property in the civil suit but also properties named in the criminal indictment; the civil complaint incorporated the criminal indictment; and the Bottones were aware of the criminal charges against them when they entered into the stipulation. (*Millan*, 2 F.3d at 19.) The court did not find dispositive the fact that the civil and criminal cases were filed separately with different docket numbers, because the court noted that under Federal procedure this was the established practice. (*Millan*, 2 F.3d at 20.) Referring to *Halper*, the court also noted that this was not a case where the government might act abusively by seeking a second punishment where it was dissatisfied with the punishment levied in the first action; rather the actions of the government were contemporaneous. *Millan*, 2 F.3d at 20.

Millan was decided before *Kurth Ranch*, whose holding casts serious doubt on its continuing validity. (See *Torres*, 28 F.3d at 1465.) Indeed, it has been conclusively rejected by the ninth circuit in *U.S. Currency* and by the seventh circuit in *Torres*, both post-*Kurth Ranch* decisions. The court in *U.S. Currency* found the position adopted by *Millan* "contradicts controlling Supreme Court precedent as well as common sense." (*U.S. Currency*, 33 F.3d at 1216.) In a similar vein, *Torres* noted

that "[c]ivil and criminal proceedings are not only docketed separately but also tried separately, and under the double jeopardy clause separate trials are anathema." *Torres*, 28 F.3d at 1465; see also *1979 Cadillac DeVille*, 632 So. 2d at 1228-29 (distinguishing *Millan* and noting the forfeiture proceeding in *Millan* was incorporated into the criminal indictment).

For the same reasons expressed by the seventh and ninth circuits, we find the State's argument based on *Millan* unpersuasive as to defendant Turner. For other reasons, discussed below, we agree with the State's contention that defendant Towns' conviction does not violate the double jeopardy clause.

As to defendant Turner, the facts indicate that the civil forfeiture and criminal case were separate proceedings. The forfeiture proceeding was complete on August 20, 1992, when, following a hearing, Judge Grometer ordered the forfeiture of $2,165 seized from Turner. The criminal indictment against Turner, based on the same conduct, was not filed until January 5, 1993, and was docketed separately and assigned to a different judge. In view of *Kurth Ranch* and *U.S. Currency*, it is clear that the forfeiture and criminal proceedings were separate. As the Court of Appeals stated in *U.S. Currency*, "[a] forfeiture case and a criminal prosecution would constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time." (Emphasis in original.) (*U.S. Currency*, 33 F.3d at 1216.) Thus, we cannot deem the civil forfeiture and criminal prosecutions in No. 2-94-0111 to be part of the same proceeding.

As to defendant Towns, we are presented with a different set of facts. On June 29, 1992, the Kane County State's Attorney sent Towns a notice of pending forfei-

ture by certified mail, in compliance with section 6 of the Forfeiture Act. (725 ILCS 150/6 (West 1992).) Towns then had 45 days from the effective date of the notice to file a verified claim with the State's Attorney, asserting his interest in the property. (725 ILCS 150/6(C)(1) (West 1992).) Towns failed to file a claim within the 45-day period, and a nonjudicial declaration of forfeiture was executed on August 17, 1992.

The State argues that Towns' failure to make a claim to the property prevented him from being made a party to the forfeiture proceeding and that, as a result, he was never in jeopardy in that proceeding. In response, Towns argues that because the property was seized from him, he had a possessory interest sufficient to place him in jeopardy in the forfeiture proceeding regardless of whether he filed a claim.

Neither party has cited, and our research has not revealed, any Illinois case addressing the effect of the failure to file a claim by the alleged owner of property which is the subject of a forfeiture. However, the seventh circuit recently confronted this question in the previously discussed case of *United States v. Torres* (7th Cir. 1994), 28 F.3d 1463. There, the property in issue was $60,000 in cash seized from Torres and another man by Federal agents in a drug arrest. Torres received notice of the impending forfeiture of the seized money but chose not to make a claim to it. The court held that Torres' failure to make a claim to the property rendered him a nonparty to the forfeiture proceeding. As a result, Torres was not in jeopardy in the forfeiture proceeding and his subsequent criminal prosecution was not barred by the double jeopardy clause. (*Torres*, 28 F.3d at 1465.) Judge Easterbrook, writing for the court, noted that "[y]ou can't have

double jeopardy without a former jeopardy" and stated: "As a non-party, Torres was not at risk in the forfeiture proceeding, and '[w]ithout risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy.' " *Torres*, 28 F.3d at 1465, quoting *Serfass v. United States* (1975), 420 U.S. 377, 391-92, 43 L. Ed. 2d 265, 276, 95 S. Ct. 1055, 1064.

We find the reasoning of *Torres* persuasive. Despite being given the statutorily mandated notice of the forfeiture, Towns made no claim to the money and, hence, never became a party to the proceeding. Instead of following the prescribed method for asserting his interest in the seized cash, he allowed it to be forfeited. Because he did not make himself a party to the forfeiture proceeding at the appropriate time, the forfeiture of the money "did not impose any penalty on *him* [and] * * * the argument derived from *Kurth Ranch* fails." (Emphasis in original.) (*Torres*, 28 F.3d at 1466.) We therefore find that because Towns was never in jeopardy in the forfeiture proceeding, his subsequent criminal conviction does not violate the fifth amendment.

We conclude that, since a judgment of forfeiture has been entered, further prosecution of defendant Turner is barred by the constitutional prohibition against double jeopardy. In case No. 2-94-0111, the trial court's order denying defendant Turner's motion to dismiss is vacated and the criminal charges are hereby dismissed with prejudice. In case No. 2-93-1376, the conviction of defendant Towns is affirmed for the reasons stated above.

No. 2-93-1376, Affirmed.

No. 2-94-0111, Vacated; cause dismissed.

McLAREN, P.J., and GEIGER, J., concur.

(Letterhead of)

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT

Appeal from the Circuit Court of County of Kane

Trial Court No.: 92CF2086

THE COURT HAS THIS DAY, 03/29/95, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-94-0111

People v. Turner, Roderick

Upon consideration of the Petition for Rehearing filed by plaintiff-appellee, the Petition for Rehearing is hereby denied.
(Bowman, McLaren, Geiger, JJ.)

LOREN J. STROTZ
Clerk

APPENDIX C

[Dated March 1, 1995]

Nos. 2-93-1050 & 2-93-1212, cons.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

In re P.S., a Minor,	)	Appeal from the Circuit Court of Kane County.
	)	
	)	No. 93-J-83
	)	
(The People of the State of Illinois, Petitioner-Appellee, v. P.S., Respondent-Appellant).	)	Honorable Richard Larson, Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
	)	
Plaintiff-Appellee,	)	No. 91-CF-1649
	)	
v.	)	
	)	
JOHN KIMERY,	)	Honorable Barry Puklin, Judge, Presiding.
Defendant-Appellant.	)	

RULE 23 ORDER

The above-titled cases have been consolidated for decision, each having raised a double-jeopardy issue premised on similar facts and circumstances. The appeals are taken pursuant to Supreme Court Rule 604(f), which provides that a "defendant may appeal to the Appellate

Court the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy." 145 Ill. 2d R. 604(f).

In case No. 2-93-1050, *In re P.S.*, on May 4, 1991, respondent minor was charged by complaint in circuit court case No. 91-CF-663 with unlawful possession of cannabis, a Class 4 felony (720 ILCS 550/1 (West 1992)), and unlawful possession of cannabis with intent to deliver, a Class 3 felony (Ill. Rev. Stat. 1991, ch. 56 1/2, pars. 704(d), 705(d) (now 720 ILCS 550/4(d), 5(d), (West 1992))). The respondent was arrested following the execution of a search warrant on May 3, 1991, in Geneva, Illinois, which resulted in the charges and the seizure of a 1982 Cadillac Eldorado and currency in the amount of $1,627.22.

The funds became the subject of a forfeiture complaint filed by the State on September 3, 1991, and amended September 4, 1991, in circuit court case No. 91-MR-357. Respondent appeared as a claimant in the civil forfeiture proceeding prosecuted pursuant to the Drug Asset Forfeiture Procedure Act (Forfeiture Act) (Ill.Rev.Stat. 1991, ch. 56 1/2, par. 1671, *et seq.* (now 725 ILCS 150/1 *et seq.* (now 725 ILCS 150/1 *et seq:* (West 1992))). After a bench trial before Judge James Quetsch, the funds were forfeited to the State on August 31, 1992.

On February 2, 1993, the criminal charges in case No. 91-CF-663 were ordered transferred to the juvenile court for adjudication, and a petition to find respondent delinquent based on these charges was filed on February 24, 1993, in circuit court case No. 93-J-83. Respondent filed a motion to dismiss the criminal charges on the ground of double jeopardy, arguing that he had once been punished as a result of the civil forfeiture proceeding and

could not again be placed in jeopardy for the same conduct in the juvenile proceeding. Respondent's motion was denied by Judge Richard Larson on September 1, 1993, and this appeal followed. Respondent raises the issue whether he would be impermissibly subjected to double jeopardy by the State's attempts at further prosecution. This court stayed the proceedings below pending resolution of the appeal. The juvenile delinquency proceeding will be treated as a criminal proceeding for purposes of determining the applicability of double jeopardy. (See *In re McGovern* (1978), 62 Ill. App. 3d 1049, 1052 (in drug case, court determined doctrine of double jeopardy applies to delinquency proceedings as well as to criminal proceedings).) See also 134 Ill. 2d R. 660(a) ("Appeals from final judgments in delinquent minor proceedings, except as otherwise specifically provided, shall be governed by the rules applicable to criminal cases").

In case No. 2-93-1212, *People v. Kimery*, defendant, John S. Kimery, was indicted on October 22, 1991, in criminal case No. 91-CF-1649, for unlawful possession of a controlled substance (cocaine) weighing less than 15 grams, a Class 4 felony (Jll. Rev. Stat. 1991, ch. 56 1/2, par. 1402(c) (now 720 ILCS 570/402(c) (West 1992))). The offense was alleged to have occurred on October 6, 1991, in Aurora, Illinois. On November 18, 1991, the State filed a forfeiture complaint against a 1982 Maroon Ford Mustang, VIN #1FABP1OBOCF213758, pursuant to the Forfeiture Act in circuit court case No. 91-MR-438. The complaint alleged that defendant was stopped after police observed a transaction involving defendant in Aurora on October 6, 1991. The police recovered cocaine from defendant, who had been seen driving the Mustang which was alleged to have been used to facilitate the sale, receipt,

possession, and concealment of a controlled substance. John and Steven Kimery appeared as owners-claimants in the forfeiture proceeding to seek return of the property. After a bench trial before Judge James Quetsch, the Mustang was forfeited to the State by an order dated May 26, 1992. That order was affirmed by this court in *People v. One 1982 Maroon Ford Mustang, VIN 1FABP1OBOCF213758* (1994), 258 Ill.App.3d 127.

On August 13, 1992, defendant filed a motion to dismiss the criminal charge on the ground of double jeopardy; the motion was taken under advisement. On April 12, 1993, defendant entered a guilty plea. Prior to sentencing, on July 8, 1993, defendant moved to vacate his plea and to dismiss the charge, relying in part on the United States Supreme Court's decision in *Austin v. United States* (1993), 509 U.S. ___, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (determining that a civil forfeiture may be deemed a punishment for a criminal offense under certain circumstances). Judge Barry Puklin denied defendant's motion and sentenced him to one year of imprisonment, but the court stayed the sentence pending appeal.

As a preliminary matter, we address the State's contention in the *Kimery* case that this court does not have jurisdiction to hear that appeal because defendant pleaded guilty and, following the imposition of sentence, did not file a Rule 604(d) motion to withdraw his plea and vacate the judgment as a prerequisite to the appeal. (145 Ill. 2d. R. 604(d).) Here, *prior* to sentencing, defendant renewed his motion to dismiss the cause on double jeopardy grounds, and, in the alternative, sought to stay the sentencing proceeding. The motion was denied. Defendant requested leave to file his notice of appeal, which notice, filed that same day, states that it was

brought prior to final disposition. Judge Puklin nevertheless proceeded to sentencing despite defendant's request to file his notice of appeal immediately following the denial of his motion. The court stated: "I'm going to go ahead with sentencing anyway, and no matter what I do, I'm gonna make a decision, withhold judgment, allow you to take the appeal, but I don't want this comin' back two years from now." We believe the court should have terminated the proceeding when defendant sought to file his notice of appeal.

Rule 604(f) grants defendant the right to file an interlocutory appeal from the denial of his motion to dismiss the cause on double jeopardy grounds (*People v. Franklin* (1987), 159 Ill. App. 3d 56, 60), and the rule appears to place no other temporal restrictions on the filing of a notice of appeal other than the denial of the motion to dismiss (145 Ill. 2d R. 604(f)). Defendant did not forego his right to appeal pursuant to Rule 604(f) when the court proceeded to pronounce sentence notwithstanding his request to file his notice of appeal immediately. Rule 604(d) should not be used to render nugatory defendant's right to appeal. A defendant's failure to file or renew a Rule 604(d) motion is ordinarily excused when the defendant is misled or prevented by the court from filing a proper motion. *People v. Ramage* (1992), 229 Ill. App. 3d 1027, 1031; *People v. Radunz* (1989), 180 Ill. App. 3d 734, 740.

In addition, although a double jeopardy claim can be waived, the mere entry of a guilty plea generally does not, without more, waive a claim that the State may not constitutionally prosecute the defendant on double jeopardy grounds. An admission of guilt does not waive an objection to being haled into court in the first place.

(*Menna v. New York* (1975), 423 U.S. 61, 46 L. Ed. 2d 195, 96 S. Ct. 241 (*per curiam* opinion) (and footnotes therein); see *People v. Dieterman* (1993), 243 Ill. App. 3d 838, 842-43.) The claim before the trial court and now on appeal was not whether defendant was guilty but whether he should be prosecuted and punished again for the same offense. We find that we have appellate jurisdiction, and defendant has not waived his double jeopardy claim.

As in respondent's case, defendant Kimery contends that, since a (civil) drug asset forfeiture has been deemed a criminal punishment under *Austin*, he cannot be prosecuted in a subsequent or separate criminal proceeding stemming from the same conduct which resulted in the forfeiture, because the constitutional prohibition against double jeopardy bars such multiple punishments. This issue concerns a developing area of constitutional law and is one of great importance in this jurisdiction. We thus consider cases from other jurisdictions. The weight of authority strongly supports the position taken by appellants. Based on our analysis of the current state of the law, we conclude that the prohibition against double jeopardy bars further proceedings in their respective cases. We therefore vacate the orders in question and dismiss the charging instrument with prejudice in each case.

The double jeopardy clause of the Fifth Amendment to the United States Constitution reads: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." (U.S. Const. amend. V; see also Ill. Const. 1970, art. I, §7 ("No person shall be *** twice put in jeopardy for the same offense").) The double jeopardy clause protects against three distinct abuses: (1) a

second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense when sought in separate proceedings. Multiple punishments may be sought in the same proceeding or trial, provided that the total punishment does not exceed that authorized by the legislature. (*United States v. Halper* (1989), 490 U.S. 435, 451, 104 L. Ed. 2d 487 ___, 109 S. Ct. 1892, 1903 (under the double jeopardy clause, defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial (*i.e.*, compensatory), but rather as a deterrent or retribution (*i.e.*, punishment)).) The third of these protections is well settled in Anglo-American jurisprudence (*Halper*, 490 U.S. at 440, 104 L. Ed. 2d at 496, 109 S. Ct. at 1897) and is the subject of this appeal.

The fundamental purpose of the double jeopardy clause is to protect an accused from being forced to defend against repeated attempts to exact one or more punishments for the same offense; that protection applies with equal force whether the first prosecution results in a conviction or an acquittal. (*United States v. $405,089.23 U.S. Currency* (9th Cir. 1994), 33 F.3d 1210, 1215.) The principle involved is that "a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts." *U.S. Currency*, 33 F. 3d at 1215, quoting *Abbate v. United States* (1959), 359 U.S. 187, 3 L. Ed. 2d 729, 79 S. Ct. 666.

To determine whether the State's attempts to further prosecute respondent and defendant contravene the double jeopardy clause, we consider two questions: (1) Did the civil forfeiture under the Forfeiture Act amount to a "punishment" for double jeopardy purposes?; and (2) Was there a separate prosecution in each cause? (See *U.S. Currency*, 33 F.3d at 1216.) If the answer to either question is negative, then double jeopardy is not implicated.

In recent cases, the United States Supreme Court has determined that a civil penalty constitutes punishment for double jeopardy purposes, despite its civil label, when the sanction, as applied, serves the goals of punishment, retribution or deterrence, rather than remediation (*i.e.*, when the sanction is used to compensate or to make the government whole). In 1989, the *Halper* court stated "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." (*Halper*, 490 U.S. at 448, 104 L. Ed. 2d at 502, 109 S. Ct. at 1902 (holding disproportionate civil penalties for Medicare fraud to be punishment for double jeopardy purposes).

After tracing the history of forfeitures, in *Austin v. United States* (1993), 509 U.S. ___, 125 L. Ed. 2d 488, 113 S. Ct. 2801, the Court determined that a civil forfeiture stemming from a drug offense was a criminal punishment under the excessive fines clause of the Eighth Amendment. The Court observed that forfeiture serves, at least in part, to punish the owner and that an innocent owner defense was available. The Court applied the *Halper* test of whether the statute served at least *in part* to punish, and noted that, even though it might

have some remedial purpose, the statute focused on the culpability of the owner in tying it to a drug offense and that a forfeiture of property (as a fixed penalty) may have no correlation to any damages suffered by society or to the cost of law enforcement. In view of the statute's objectives to deter and to punish, the Court stated: "we cannot conclude that forfeiture *** serves solely a remedial purpose" and concluded that forfeiture constituted payment to a sovereign as punishment for some offense and was thus subject to the limitations of the Eighth Amendment's excessive fines clause. *Austin*, 509 U.S. at ___, 125 L. Ed. 2d at 488, 113 S. Ct. at 2812.

More recently, in *Department of Revenue of Montana v. Kurth Ranch* (1994), ___U.S.___, 128 L. Ed. 2d 767, 114 S. Ct. 1937, the Court held that a State tax imposed on the possession and storage of dangerous drugs, including harvested marijuana, was neither merely for revenue purposes nor was it remedial, but amounted to a punishment for the defendant's conduct and thus could not be collected in a separate proceeding following a criminal prosecution. In order to avoid the double jeopardy prohibition, the penalty would have had to be imposed in the criminal prosecution or not at all. In affirming without remanding to the lower court, the Supreme Court observed that the tax did not even remotely approximate the costs of law enforcement to the State (nor did State make this claim), and the tax would have been the same regardless of the amount of the State's damages.

Several Federal and State courts have not followed the Supreme Court's lead in concluding that a criminal prosecution brought separately from a civil forfeiture proceeding where the sanction is deemed to be punishment will be barred under the double jeopardy prohibition. See

U.S. Currency, 33 F. 3d at 1215 (in drug conspiracy and money laundering case, civil forfeiture of property was punishment for double jeopardy purposes where statutes did not serve solely remedial purpose and where criminal prosecution was brought at approximately the same time as a separate "parallel" civil forfeiture action); *United States v. Torres* (1994), 28 F. 3d 1463 (jeopardy attaches at beginning of forfeiture proceeding when evidence first introduced, but defendant was not a claimant protected by double jeopardy clause; criticizes *United States v. Millan* (2d Cir. 1993), 2 F. 3d 17); *United States v. McCaslin* (W.D. Wash. 1994), 863 F. Supp. 1299 (civil forfeiture of residential realty, though involving consent judgment, was punishment regardless of value of property and barred later imposition of criminal sentence even though prosecutions were close in time—regardless of the order of prosecutions; explains *Kurth Ranch*); *Clifft v. Indiana Department of State Revenue* (Ind. Tx. Ct. 1994), 641 N.E. 2d 682 (following *Kurth Ranch*; controlled substances tax was punishment for double jeopardy purposes and could not be collected from defendant who had pleaded guilty to offense); *State v. 1979 Cadillac DeVille* (La. Ct. App. 2d Cir. 1994), 632 So. 2d 1221 (forfeiture of automobile as derivative contraband violated double jeopardy clause even though statute served some partly remedial purpose, where forfeiture proceeding was separate from criminal proceeding; distinguishing *Millan* (dissent filed), *writ granted* (1994), 642 So. 2d 1302; *New Mexico Taxation & Revenue Department v. Whitener* (Ct. App. 1993), 117 N.M. 130, 869 P. 2d 829 (drug tax was punishment which violated prohibition against double jeopardy where defendant had been convicted for drug offense and State failed to show tax was proportional and remedial (dissent filed)), *cert. granted* (1994), 117 N.M.

328, 871 P. 2d 884; *Fant v. State* (Tex. App. 14 Dist. 1994), 881 S.W. 2d 830, (civil forfeiture was punishment even though partly remedial, barring further criminal prosecution (dissent filed); rejects *Johnson v. State* (Tex. App. 1st Dist. 1994), 882 S.W. 2d 17, which held forfeiture of personal property was not overwhelmingly disproportionate penalty but was remedial instead) (*review granted*); *State v. Clark* (Wash. 1994), 124 Wash. 2d 90, 875 P. 2d 613 (civil forfeiture of home and motorhome was punishment under excessive fines clause but double jeopardy issue was not reached).

In view of the above-cited authorities, particularly *Austin*, *Kurth Ranch*, and *U.S. Currency*, we similarly conclude that the forfeitures in the instant cases constituted punishments for double jeopardy purposes. A review of our State's Forfeiture Act (Ill. Rev. Stat. 1991, ch. 56 1/2, par. 1671, *et seq.* (now 725 ILCS 150/1 *et seq.* (West 1992))) shows that the Forfeiture Act intended civil forfeitures to have "a significant beneficial effect in deterring the rising incidence of abuse and trafficking" in controlled substances (Ill. Rev. Stat. 1991, ch. 56 1/2 par. 1672 (now 725 ILCS 150/2 (West 1992))), and the Forfeiture Act provides defenses for innocent owners or interest holders (Ill. Rev. Stat. 1991, ch. 56 1/2, par. 1678 (now 725 ILCS 150/8 (West 1992))). The objective of the Forfeiture Act is to deter and is triggered by a criminal violation. The intent of the Forfeiture Act is clearly to punish. The State has made no real showing here or below that the forfeitures were proportional and remedial in nature. (*Cf. Johnson*, 882 S.W. 2d 17; *Fant*, 881 S.W. 830 (dissent), interpreting *Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892.) In any case, in the wake of *Austin* and *Kurth Ranch*, we believe that a forfeiture, like those here, which is essentially a fixed penalty with-

out regard to the value of the property, constitutes punishment even though it may have remedial purposes.

We also believe that the forfeiture proceedings were separate from the criminal proceedings in each case. As we have noted, multiple punishments for the same conduct may be permissible if imposed in the same proceeding, but they are barred if imposed in separate proceedings. *Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892; *McCaslin*, 865 F. Supp. 1299.

The State argues that the double jeopardy clause does not apply because the civil and criminal actions were part of a single, coordinated prosecution of respondent and defendant, respectively. In *P.S.*, the State points out that the Cannabis Control Act provides for criminal penalties for the unlawful possession of cannabis (Ill. Rev. Stat. 1991, ch. 56 1/2, pars. 704, 705 (now 720 ILCS 550/4, 5 (West 1992))) and for a civil forfeiture of property allowed to be seized in connection with the offense (Ill. Rev. Stat. 1991, ch. 56 1/2, par. 712 (now 720 ILCS 550/12 (West 1992))). The forfeiture proceeding, however, is governed by the Forfeiture Act which is declared to be civil in nature. (Ill. Rev. Stat. 1991, ch. 56 1/2, par. 1672 *et seq.* (now 725 ILCS 150/2 *et seq.* (West 1992))). The State maintains that the actions against respondent were "simultaneous."

The chronology of events shows that respondent was arrested on May 3, 1991, and the property was seized. A criminal complaint was filed on May 4, 1991. The civil forfeiture complaint was originally filed on September 3, 1991. A judgment of forfeiture was entered on August 31, 1992. The criminal charges were transferred to the juvenile court in February 1993, and a delinquency petition was filed on February 24, 1993. A different judge

presided in each case, and the civil case was concluded separately from the criminal case. Nevertheless, the State maintains that there was one "synchronized effort" on the part of the State to obtain both the civil and criminal penalties.

In *Kimery*, defendant was indicted on October 22, 1991, for an offense alleged to have occurred on October 6, 1991. A forfeiture complaint was filed on November 18, 1991. A final judgment of forfeiture was entered on May 26, 1992, and was affirmed in this court's opinion filed February 22, 1994. (*One 1982 Maroon Ford Mustang*, 258 Ill. App. 3d 127.) A different judge presided over the criminal proceeding than the one who presided over the civil proceeding.

In arguing that the civil and criminal proceedings comprise a single, coordinated prosecution for double jeopardy purposes, the State garners some support from *United States v. Millan* (2d Cir. 1993), 2 F. 3d 17. In *Millan*, on July 30, 1991, arrest warrants were issued for over 40 individuals including the Bottones, and, based on the same affidavit, seizure warrants were issued for assets connected to the illegal drug activities. Among the assets seized under the civil warrants was the "Auction Cars" used car business. (*Millan*, 2 F. 3d at 18.) On August 14, 1991, an indictment was filed against defendants charging them, *inter alia*, with participation in a narcotics distribution conspiracy. The same indictment included a criminal forfeiture count for properties derived as the proceeds from, or used to facilitate, drug offenses. On December 26, 1991, the government also filed an *in rem* civil forfeiture suit against Auction Cars and bank accounts later claimed by one of the defendants, Alfred Bottone, Jr. In its complaint, the government incorporated the indictment by reference. *Millan*, 2 F. 3d at 18-19.

On October 5, 1992, a superseding indictment charged the Bottones with joint and several liability for the forfeitures of property obtained as a result of the narcotics violations. On January 20, 1993, the Bottones entered into a stipulation whereby the government relinquished its claim to $101,000 in several bank accounts and other assets to enable the Bottones to pay attorney fees. In return, the Bottones relinquished any claim to $240,000 in cash and certain other seized properties. The civil *in rem* suit was then dismissed. (*Millan*, 2 F. 3d at 19.) On February 23, 1993, the Bottones filed a motion to dismiss the superseding indictment on double jeopardy grounds, claiming that under *Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892, the settlement agreement constituted punishment within the meaning of the double jeopardy clause. The trial court denied the motion, finding that the civil and criminal proceedings constituted a single proceeding. The circuit court of appeals affirmed, holding that the civil forfeiture suit was part of a single, coordinated prosecution of persons involved in alleged criminal activity. (*Millan*, 2 F. 3d 17.) Accord *United States v. One Single Family Residence* (11th. Cir. 1994), 13 F. 3d 1493.

The *Millan* court noted that the civil and criminal warrants were issued the same day by the same judge; the stipulation involved not only the seized property in the civil suit but also properties named in the criminal indictment; the civil complaint incorporated the criminal indictment; and the Bottones were aware of the criminal charges against them when they entered into the stipulation. (*Millan*, 2 F. 3d at 19.) The court did not find dispositive that the civil and criminal cases were filed separately with different docket numbers, because under Fed-

eral procedure, this was the established practice. (*Millan*, 2 F. 3d at 20.

Relying in part on *Millan* without much elaboration, the court in *Family Residence* found that the double jeopardy protection was not implicated where the government pursued simultaneous criminal and civil sanctions against the defendant within a single, coordinated prosecution. (*Family Residence*, 13 F. 3d at 1499.) The government filed an *in rem* civil forfeiture on October 11, 1990, against defendant's residence following a search and seizure of the residence for evidence of illegal gambling activities on October 10, 1990, and criminally indicted defendants on March 26, 1991. The court found that the circumstances of the simultaneous pursuit by the government of both criminal and civil sanctions fell within the contours of "a single, coordinated prosecution." *Family Residence*, 13 F. 3d at 1499.

Both *Millan* and *Family Residence* have been rejected in *United States v. Torres* (1994), 28 F. 3d 1463, 1465 ("Civil and criminal proceedings are not only docketed separately but also tried separately, and under the double jeopardy clause separate trials are anathema"); and *U.S. Currency*, 33 F. 3d at 1216 (the *Millan* and *Family Residence* decisions contradict Supreme Court precedent as well as common sense; "We fail to see how two separate actions, one civil and one criminal, tried at different times before different factfinders *** resolved by separate judgments, constitute the same 'proceeding' "). See also *1979 Cadillac DeVille*, 632 So. 3d at 1228-29 (distinguishing *Millan* and noting the forfeiture proceeding in *Millan* was incorporated into the criminal indictment).

We do not find *Millan* and *Family Residence* persuasive or applicable. Here, in each case, the proceedings

were docketed separately, were instituted before separate judges, and judgments were entered separately. We cannot deem them parts of a single, coordinated prosecution. The State can avoid this type of double jeopardy problem by choosing its remedy or by employing a mechanism to bring the actions together in the same proceeding. "It is entirely reasonable to put the government to this choice." *U.S. Currency*, 33 F. 3d at 1222.

Support for the above conclusions can be found in a recent opinion issued by this court. (*People* v. *Towns* (2nd Dist. February ___, 1995), No. 2-93-1376, slip op. at 13.) In similar circumstances and utilizing a similar analysis, this court found a civil forfeiture to be punishment for purposes of the double jeopardy clause of the United States Constitution. (*Towns*, No. 2-93-1376, slip op. at 13.) This court further concluded that the civil forfeiture action and the criminal action, filed on separate dates and assigned to separate judges, were not part of a single coordinated prosecution, and therefore, the subsequent criminal prosecution was barred by the double jeopardy clause. *Towns*, No. 2-93-1376, slip op. at 18-19.

We conclude that, in each case, since a judgment of forfeiture has been entered, further prosecution is barred by the constitutional prohibition against double jeopardy. In case No. 2-93-1050, *In re P.S.*, the delinquency petition is hereby dismissed with prejudice. In case No. 2-93-1212, *People v. Kimery*, the conviction and sentence are vacated and the criminal charges are hereby dismissed with prejudice.

No. 2-93-1050, vacated; cause dismissed.

No. 2-93-1212, vacated; cause dismissed.

INGLIS, J., with GEIGER and THOMAS, JJ., concurring.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
F I L E D
MAY 10 1996
CLERK

No. 95-1429

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PEOPLE OF THE STATE OF ILLINOIS, Petitioner, -vs- JACQUELINE MONTANEZ, Respondent	) On Petition for a Writ) of Certiorari to the) Appellate Court of Illinois) First District, Second Div.)) _____))Respondent's Brief in)Opposition to the Petition

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Jacqueline Montanez asks leave to file the attached Brief in Opposition to a Petition for a Writ of Certiorari to the Appellate Court of Illinois without payment of fees or costs and proceed in forma pauperis.

Respondent was represented in the trial and appellate courts by court-appointed counsel.

Respondent's affidavit of indigency is attached in support of this motion.

Respectfully submitted,

RITA A. FRY,
Public Defender of Cook County
200 West Adams St., 9th Floor
Chicago, Illinois 60606
(312) 609-2040

By James H Reddy
JAMES H. REDDY
Chief, Appeals Division

Counsel of Record.

STATE OF ILLINOIS, Petitioner

v.

JACQUELINE MONTANEZ, Respondent

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, **Jacqueline Montanez**, being first duly sworn, depose and say that I am the respondent in this cause; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of this case or give security therefore; and that I believe I am entitled to redress.

I further swear that:

1. I am not presently employed;
2. During the past twelve months I have had no income;
3. I have no cash, checking or savings account;
4. I own no property;
5. No one is dependent upon me for support.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

Jacqueline Montanez #B17331
JACQUELINE MONTANEZ

SUBSCRIBED and SWORN TO
Before me this 10th day
of May, A.D., 1996.

Vida Catledge Brown
NOTARY PUBLIC

"OFFICIAL SEAL"
VIDA CATLEDGE BROWN
Notary Public, State of Illinois
My Commission Expires 8/9/99

QUESTION PRESENTED FOR REVIEW

Whether the Illinois Appellate Court did what it said it did: followed the well-established, directly on point and controlling precedent of the Illinois Supreme Court by applying a totality of the circumstances analysis to determine that the 15 year old respondent's confession was not voluntary?

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No. 95-1429

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

JACQUELINE MONTANEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, SECOND DIVISION

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The fifteen year old minor respondent was charged with two murders. (R.C. 15-18) She was tried as an adult before a jury and convicted. She was sentenced to a mandatory term of natural life imprisonment. (R.C. 67,68; Vol. III F15)

Pre-trial respondent moved to suppress in custody statements as involuntary. (R.C. 41-43) After a hearing the motion was denied. (Vol. IV A8-9)

At the hearing Detective Halvorsen testified that he and his partner, Detective Guevarra, arrested respondent at nine p.m. on May 13, 1992, on the street after a funeral. Respondent was taken into custody for the murders of Hector Reyes and Jimmy Cruz the previous day. Respondent was taken to Area 5 in a squad car and placed in an interview room. (Vol. II 3-5) Halvorsen informed respondent of her Miranda rights and that "she could possibly be charged as an adult in this case." (Vol II. 5-6)

Halvorsen testified that between 9:30 and 10:00 p.m., he tried to contact a youth officer and to have respondent's family informed of her arrest.

Halvorsen asked that a squad car be sent to inform respondent's family of her arrest. He had no personal knowledge if this request was followed up. (Vol. II. A24-25) Halvorsen also contacted the office of the youth officer. He was told a youth officer would be available sometime after midnight. (Vol. II A22) At 10 p.m. Halvorsen returned to respondent and began the interrogation. (Vol. II A10)

Sandra Lorenzi, respondent's mother testified that police came to her home at about ten p.m. The police first told Mrs. Lorenzi her daughter was a witness. Eventually they informed her her daughter was involved. Mrs. Lorenzi requested to see her daughter. The officer told her "not right now because they had her in custody." The officer told her they would telephone to let her know when she could come and that she had to wait until she was called. (Vol. II A55-59)

Mrs. Lorenzi waited until about 2:00 a.m. When the officer had not called by that time, she decided to wait no longer. (Vol. II 60-61) At the station, Mrs. Lorenzi spoke to the desk sergeant and was told she had to wait in a waiting room. Mrs. Lorenzi was so nervous she went upstairs. There she saw a Spanish detective. She did not know his name. (Detective Halvorsen's partner, Detective Guevarra was Spanish speaking. (Vol. II. A26)) He told her she had to wait downstairs until he called her. Mrs. Lorenzi waited for one and one half hours. She then went back upstairs. The same detective told her to "get the hell" out of there because they were talking to her daughter. Again, at about 3:15 a.m., Mrs. Lorenzi went upstairs but was not able to see respondent. She was finally allowed to see her at 8:30 a.m. (Vol. II 60-63, 70)

Halvorsen testified that when he returned to respondent at 10 p.m. he advised her of her rights and took a statement. (Vol. II A10) At around midnight Halvorsen's partner told him he had spoken with respondent's mother and she would get there as soon as she could. (Vol. II A7,25) Also at midnight a youth officer and an Assistant State's Attorney arrived. (Vol. II A22) At 12:30 a.m. the

youth officer spoke with respondent, telling her he was there to protect her rights. He gave her food and informed respondent her mother had been contacted. (Vol. II A28-33)

At 1:15 a.m. the Assistant State's Attorney spoke with respondent. He advised her of her rights and took an oral statement. At 5:15 a.m. a court reporter took respondent's statement. At 6:15 a.m. the statement was reviewed and signed. (Vol. II A39-45)

The Assistant State's Attorney acknowledged that throughout the statement the respondent's name Montanez was misspelled - Montrnez. The name was also signed that way by respondent. Respondent signed her name after the statement was typed with the incorrect spelling. Dillon did not discuss the spelling with respondent when they reviewed the statement. He assumed it was the correct spelling. (Vol. II 51)

Detective Halvorsen, the youth officer and the Assistant State's Attorney testified they were not aware that respondent's mother had come to the police station and was trying to see her daughter. (Vol. IIA 17,35,47-48)

Mrs. Lorenzi testified that on prior occasions she had observed her daughter under the influence of drugs and alcohol. When she saw her that morning she appeared the same way. (Vol. II A64-65) Detective Halvorsen, the youth officer and the Assistant State's Attorney testified respondent did not appear to them to be under the influence of drugs or alcohol. (Vol. II A71,35,47)

Respondent did not testify at the hearing on the motion. At trial[1] she testified she dropped out of school in the eighth grade. (Vol. III E67) On the day of her arrest she had taken drugs and alcohol. She was high. At the police station it was "like she was walking around and did not know where she was going." (Vol. III 82-84)

Respondent acknowledged being shown her court reported statement at the station, but she did not remember signing it. (Vol. III E85) She stated she must have misspelled her own name on every page because she was high. (Vol. III E110) She testified the statement was not true. (Vol. III E111) She gave it because she was scared. (Vol. III E117)

Respondent admitted the police did not strike her. She stated the police tricked her into giving the statement. They told her that Marilyn (a co-defendant) was saying she (respondent) did it, and she just went along with them. (Vol. III E107)

In denying the motion to suppress the trial judge ruled the police made "a good faith effort" to notify respondent's mother of her arrest. (Vol. IV A8)[2] The trial judge stated: "the only real issue is whether the mother was allowed access to the daughter at the police station." The trial judge ruled adversely to respondent on

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[1]Under Illinois law, evidence adduced both at a motion to suppress and at trial can be considered by the appellate court in determining the correctness of the trial court's ruling. (People v. Caballero (1984), 102 Ill.2d 23, 464 N.E.2d 223)

[2]The Court's entire finding is appended hereto as respondent's Appendix B.

this question, finding that: "The officers have testified that at no time did she (the mother) request to see the defendant." (Vol. IV A8) Finally, the trial judge discounted Mrs. Lorenzi's testimony of the "effects" of drugs and alcohol on her daughter. The judge ruled that only respondent (who did not testify at the hearing) could testify to the "effects" of her drug and alcohol ingestion.[3] In sum, the trial judge found the statement was voluntary. (Vol. IV A9)

The appellate court (one judge dissenting) ruled the trial judge's finding was manifestly erroneous. The court disagreed with the trial judge's conclusion that the police had made a "good faith" effort to notify respondent's mother. 273 Ill.App.3d at 850 Also, the appellate court showed that the trial judge's finding that respondent's mother did not request to see respondent was contrary to the record. 273 Ill.App.3d at 851 The Court concluded that under the totality of the circumstances the interrogation of an isolated 15 year old throughout the night while the police actually obstructed parental counselling resulted in an involuntary statement.

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[3] Respondent's appellate court brief argued this ruling was in error requiring a new hearing. This issue was not reached because of the appellate court's more fundamental ruling that a new trial is required.

REASON FOR DENYING THE WRIT

THE APPELLATE COURT FOUND THE STATEMENT INVOLUNTARY UNDER THE TOTALITY OF THE CIRCUMSTANCES AND DID NOT CREATE OR APPLY A PER SE RULE.

Petitioner (following the dissent) asserts the appellate court applied a per se rule that absence of a concerned adult renders a juvenile's confession involuntary. Petitioner asserts that the appellate court substitutes this incorrect rule for the correct totality of the circumstances analysis. The appellate court, however, explicitly denied application of a per se rule and explicitly embraced the totality of the circumstances standard:

> "The dissent mischaracterizes our decision by charging that we apply a per se rule instead of a totality of the circumstances test in determining the voluntariness of defendant's confession. Our decision, however, is not based solely on the fact that defendant was interrogated without the opportunity to confer with a concerned adult. Here, a juvenile defendant, age 15, was interrogated throughout the night as part of a pattern of police conduct designed to elicit a confession, as well as to obstruct parental counselling. Under all these circumstances, the confession was not voluntary." 273 Ill.App.3d at 855

Petitioner asserts this language of the appellate court is a subterfuge designed to cloak its application of a per se rule. Petitioner supports this charge by asserting the factors the appellate court claims to rely on are not supported by the record. (Pet. p.8) Review of the evidence shows that the factors relied on by the appellate court are fully supported. Furthermore, additional of record factors support the conclusion that under the totality of the circumstances the confession was involuntary.

Respondent's mother testified that the police informed her of her daughter's arrest at 10 p.m. She told the police she wanted to see her daughter. The police told her not to come to the station and that they would notify her when it was time for her to come. The State did not call the police officer who spoke with respondent's mother and her testimony is uncontradicted.

By statute Illinois requires prompt notice to the parent of a minor taken into custody of the arrest and the place of confinement. 705 ILCS 405/5-6. The purpose of the statute is to permit the parent to be with the child. (In re SDS (1982), 103 Ill.App.3d 1008,1012 431 N.E.2d 759) The trial judge ruled the police had complied with the statute. The appellate court found the trial judge in error, stating: "These circumstances demonstrate the intended fulfillment of notice here was simply a tragic charade." 273 Ill.App.3d at 850 Failure of notice (or a "tragic charade") is a factor in a totality of the circumstances analysis weighing against voluntariness. (People v. Travis (1984), 122 Ill.App.3d 671, 678, 462 N.E.2d 654)

Respondent's mother waited until 2 a.m. the next morning, but received no word from the police that it was time for her to come. Desperate, she disobeyed the police admonishment and went to the station. Upon arrival, and on numerous occasions thereafter, she requested to see her daughter. Each time she was refused. Finally, at 8:30 a.m., after the police had secured a court reported statement, she was allowed to see her child.

The State chose not to call the desk sergeant or other officers with whom respondent's mother interacted. The officers who were interrogating respondent testified they were "unaware" of the

mother's presence at the station. They did not testify (nor, being unaware, could they) that she did not ask to see her daughter.

The trial judge in denying the motion to suppress, found: "She [respondent's mother] arrived sometime after the arrest and the officers have testified that at no time did she request to see defendant." No officer so testified. The appellate court properly found the trial court's finding was erroneous. 273 Ill.App.3d at 851 Failure of the police on duty to notify the interrogating officers of the presence in the station of a minor's mother is a factor to be considered in evaluating the voluntariness of a confession. (People v. Brown (1989), 182 Ill.App.3d 1046, 1054, 538 N.E.2d 908)

Contrary to petitioner's assertion the record fully supports the appellate court's finding the 15 year old "was interrogated throughout the night as part of a pattern of police conduct designed to elicit a confession, as well as to obstruct parental counselling."

Petitioner seeks to downgrade the importance of respondent's age as a factor in determining voluntariness by quoting the trial judge as saying that respondent was "a little more sophisticated than the average 15 year old." (Pet. pp. 7,14) The full quote, however, shows this finding is at best a two edged sword.

The motion to suppress stated that respondent "had ingested drugs and alcohol prior to interrogation and was therefore mentally impaired." (RC 42) At the hearing respondent's mother testified respondent appeared to be under the influence of drugs and alcohol. In denying the motion the trial judge stated: "As far as the alcohol and drug ingestion, which is alleged in the motion on behalf of Ms. Montanez, that is an indication to me she is a little more

sophisticated than an average 15 year old ..." The trial judge goes on to rule that only respondent (who did not testify at the hearing), could testify as to how her will was effected by the ingestion, and that he would not accept he mother's interpretation of the "effects" of respondent's having taken drugs and alcohol. (See, trial court's finding attached as Respondent's Appendix B.)

The judge's deduction of "sophistication" from evidence of a 15 year old's drug and alcohol abuse, without even having heard the 15 year old testify, is entitled to little weight. But more important is the fact that while the judge refused to consider the evidence of the "effect" on respondent of ingestion, the judge accepts the evidence that on the night of her arrest defendant had indeed ingested drugs and alcohol. (After all, it is on this fact that the judge bases his finding of "sophistication.") This evidence, that this 15 year old girl when arrested had taken drugs and alcohol, is a compelling factor supporting the conclusion that under the totality of the circumstances the confession is involuntary. Moreover, it is a factor underlined and supported by respondent's trial testimony.

Respondent testified that she is an eighth grade dropout who was high on drugs and alcohol when the police arrested her on the street. She stated that at the police station it "was like she was walking around and did not know where she was going." She explained misspelling her own name by the fact that she was high and, while admitting the police did not strike her, stated she adopted the false confession because she was "scared." All of this evidence - the trial judge's finding that respondent had taken drugs and alcohol and respondent's evidence of the effects of that ingestion - supports the

appellate court's conclusion that under the totality of the circumstances the confession was not voluntary.

The police kept a 15 year old girl isolated from the time of her arrest at 9 p.m. until the following morning at 8:30 a.m. During this time the minor was three times interrogated. Also during this time the minor's mother was first told not to come to the station and when she came anyway was not allowed to see her daughter. This combination of obstructions demonstrates a pattern of obstruction. It is clear the police intended to and succeeded in keeping this 15 year old girl isolated from parental counselling until after a full written confession was secured and signed. Such obstruction by the police is a material factor in judging the voluntariness of a confession. (People v. Knox (1989), 186 Ill.App.3d 808, 542 N.E.2d 910)

The factors the appellate court stated it relied upon are real factors, fully supported by the record. The record also contains additional factors supporting the court's conclusion. Moreover, the opinion shows the appellate court was also fully aware of the countervailing factors.

The appellate court's opinion recognizes that respondent received Miranda advisements, that respondent testified she was not hit by the police, that there was evidence she was fed and that state's witnesses testified she was coherent and did not appear to be under the influence of drugs or alcohol. 273 Ill.App.3d at 845-46 These factors are noted in the opinion and were considered by the court. But, applying a totality of the circumstances analysis, the court found they were overcome by the factors detailed above: that

respondent was 15; that she confessed without conferring with a concerned adult; that she was questioned throughout the night; and that the police engaged in a pattern of active obstruction of parental counselling. Additionally, the evidence that respondent had ingested drugs and alcohol, was an eighth grade dropout and confessed because scared, supports the appellate court's ruling.

Given the existence of these factors and the court's explicit embrace of the totality of the circumstances standard, all petitioner is really complaining about is the court's calculation and conclusion. This is primarily a factual question, without application beyond the facts of this case. This assessment is supported by the Illinois Supreme Court's denial of petitioner's request for review.

The Illinois Supreme Court has long looked to the "totality of the circumstances" to determine the voluntariness of any confession. (People v. Nemke (1962), 23 Ill.2d 591, 600, 179 N.E.2d 825) It has stated: "The determination of the question whether or not a confession is voluntary depends not on any one factor, but upon the totality of all the relevant circumstances." (People v. Johnson (1970), 4 Ill.2d 463, 468, 256 N.E.2d 343, 347, cert. denied (1970), 400 U.S. 958, 27 L.Ed.2d 266, 91 S.Ct. 356) This standard applies to statements of juveniles as well as to those of adults. (People v. Prude (1977), 66 Ill.2d 479, 475, 363 N.E.2d 371, 373, Cert. denied (1977), 434 U.S. 930, 54 L.Ed.2d 291, 98 S.Ct. 418.) Further, the court has specifically held that absence of a parent does not per se render a minor's confession involuntary. (People v. Zepeda (1970), 47

Ill.2d 23, 265 N.E.2d 647; People v. Steptore (1972), 51 Ill.2d 208, 281 N.E.2d 642)

Petitioner in this cause requested review by the Illinois Supreme Court of the appellate court's decision claiming that the appellate court had rejected the totality of the circumstances approach and adopted a per se rule. The Illinois Supreme Court declined review. Considering the clear, long standing and directly on point holdings of the Illinois Supreme Court, had the appellate court so deviated review would have been allowed.

All parties to this case - the Illinois Supreme Court, the appellate court, petitioner and respondent - agree that there is not a per se rule barring the admission of a juvenile's statement obtained without parental presence. All also agree the proper standard for determining voluntariness is totality of the circumstances. With every one on the same side granting the petition would serve no purpose.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully prays that this Honorable Court deny the instant petition for Writ of Certiorari.

Respectfully submitted,

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A P P E N D I X

A. Appellate Court's Opinion: People v. Montanez (1995), 273 Ill.App.3d 844, 652 N.E.2d 1271

B. Trial Judge's Finding Denying Respondent's Motion to Suppress

The record indicates that the circuit court considered all relevant circumstances in fashioning the sentence and may well have sentenced defendant to a longer term in prison. There was no abuse of discretion in sentencing.

For the reasons set forth above, the conviction and sentencing of defendant must be affirmed.

Affirmed.

SCARIANO, P.J., and DiVITO, J., concur.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JACQUELINE MONTANEZ, Defendant-Appellant.

First District (2nd Division) No. 1—93—4519

Reversed and remanded.

Opinion filed June 30, 1995.

CRIMINAL LAW—*cause remanded for new trial where ongoing interrogation of juvenile was part of pattern of police attempts to elicit confession without prior parental counselling.* Although the police detective investigating a double murder made a cursory attempt to obtain a youth officer and notify the juvenile defendant's parent after her arrest, the officer's efforts did not constitute the required good-faith effort to give reasonable preinterrogation notice, where he immediately commenced the interrogation without awaiting the arrival of the youth officer or following up on whether the mother had been contacted and was at the station to confer with her daughter, so that under the totality of the circumstances showing a pattern of improper police conduct, neither the initial statement taken from the daughter without the benefit of any concerned adult nor the subsequent signed confession taken in the presence of the youth officer while the mother was unsuccessfully pleading with the desk sergeant to see her daughter could be considered voluntary, and the trial court's failure to suppress the confession required reversal of the convictions for the murder of two men and the sentence of natural life in prison and remand for a new trial was ordered.

DiVITO, J., dissenting.

Appeal from the Circuit Court of Cook County; the Hon. John J. Mannion, Judge, presiding.

Rita A. Fry, Public Defender, of Chicago (Ira Churgin, Assistant Public Defender, of counsel), for appellant.

Jack O'Malley, State's Attorney, of Chicago (Renee Goldfarb and James Fitzgerald, Assistant State's Attorneys, of counsel), for the People.

JUSTICE HARTMAN delivered the opinion of the court:

A jury found defendant, Jacqueline Montanez, age 15 at the time of the offenses, guilty of the murders of Hector Reyes and Jimmy Cruz. She was sentenced to natural life in prison. She challenges the voluntariness of her confession and the *voir dire* of prospective jurors.

Defendant moved to suppress her statements as involuntary because (1) she was not first informed of her *Miranda* rights or (2) that she would be tried as an adult; (3) her mental state and ingestion of drugs and alcohol made her incapable of understanding her rights; (4) the statements were procured by material misrepresentation; and (5) the statements were taken before she had access to a youth officer or her parents.

At the suppression hearing, Chicago police detective Ernest Halvorsen testified that on May 13, 1992, at 9 p.m., he and his partner Detective Renaldo Guevara, arrested defendant on the street for the May 12 murders of Hector Reyes and Jimmy Cruz. He knew defendant was a juvenile. She was taken to the Area Five police headquarters and placed in an interview room, where Halvorsen informed her of her *Miranda* rights and that she could "possibly" be charged as an adult. Defendant indicated that she understood these rights.

Detective Halvorsen asked that a police squad car from the 14th District be sent to defendant's home in an attempt to locate her family. Detective Guevara later told him that defendant's mother had been contacted, but said she would get to the police station as soon as she could. Halvorsen was unaware that defendant's mother was at Area Five or had not been allowed to see defendant.

After the arrest, Detective Halvorsen attempted to contact a youth officer. The youth officer on duty in an adjoining station at that time was busy. Halvorsen did not check again to see whether the youth officer later became available. An Area Five youth sergeant informed him that no Area Five youth officer was then available either, but that he would send the first available officer, who was to come on duty at midnight.

Nevertheless, at about 10 p.m., Detective Halvorsen began to question defendant. No youth officer had yet appeared. He again read her the *Miranda* warnings. She responded that she understood each of her rights and would make a statement. He had a 20- to 30-minute conversation with her and then left her alone in the interview room.

Youth officer Robert Pulia and Assistant State's Attorney (ASA) John Dillon arrived a little past midnight. Detective Halvorsen told Pulia the facts of the case. Later, at about 12:30 a.m., Pulia had a private conversation with defendant. He knew detective Halvorsen already had taken a statement from her. He advised her of her *Miranda* rights anyway, informed her that he was a youth officer, he was present to protect her rights, and he would observe how she was being treated. Pulia told her that her mother had been contacted, based upon what he was told. Pulia was present for the next three conversations Detective Halvorsen and ASA Dillon had with defendant, at 1:15 a.m., 5:15 a.m., and 6:15 a.m.

At 1:15 a.m., ASA Dillon told defendant who he was. She said she understood. Dillon advised defendant of her *Miranda* rights and that she would be treated as an adult, which defendant again stated that she understood. She then spoke to Dillon for about 20 to 30 minutes and agreed to make a statement in the presence of a court reporter. She was given food. Alone with Dillon, defendant told him that she had been treated well and had no complaints.

At 5:15 a.m., a court reporter took defendant's statement, upon ASA Dillon's questions, which was transcribed at 6:15 a.m., and reviewed by Dillon and defendant. Dillon had defendant read a couple of sentences out loud, to make sure she could read and understand English; then he read the rest of the statement to her. Defendant made corrections where appropriate and signed the statement. Dillon saw no one in a waiting area in Area Five headquarters. He did not know that anyone was asking to speak with defendant.

According to Detective Halvorsen, Officer Pulia, and ASA Dillon, defendant did not appear to be under the influence of alcohol or other drugs during their conversations with her. They smelled no alcohol or other drugs. Defendant was sober and coherent, and understood and answered all questions asked of her. Defendant did not state that she was high or under the influence of alcohol.

Defendant's mother, Sandra Lorenzi, testified at the suppression hearing. On May 13, 1992, at 10 p.m., she and her husband were at home. Two police detectives came there and first told her that defendant had witnessed a murder and was in protective custody. She asked to see her daughter. The detectives told her that she could not at that time because they had her in custody. One officer told her that he would let her know when she could see her daughter. Before they left, however, the officers informed her that defendant was involved in a murder.

Lorenzi waited for the police to call. They did not. At about 2 a.m. she nevertheless went to the police station, where she was told

to wait in a waiting room. Instead, she went upstairs but a detective sent her back downstairs. She waited about an hour and one-half and then went back upstairs. The detective told her to "get the hell out" of there because the police were talking with her daughter. She went back upstairs every hour or so. She was not permitted to see defendant until about 8:30 a.m., when she and a friend were allowed into a room to see her. Defendant appeared to be "gagging," and her eyes were bulging. She had seen defendant on alcohol and other drugs before, and defendant appeared the same way. It was difficult to understand defendant. She did not appear to recognize her mother. Lorenzi believed defendant was on drugs or alcohol that morning. After about five minutes, Lorenzi was told by police to leave.

Following argument, the court denied defendant's motion to suppress, finding that the police "exercised a good faith effort after the defendant was arrested when they notified the mother of her incarceration" and that the "only real issue is whether or not the mother was allowed access to the daughter at the police station."

A grand jury indicted defendant on June 19, 1992, for first degree murder and related charges.

At trial, evidence was adduced showing that on May 12, 1992, shortly after midnight, a witness heard laughing and giggling coming from an area in Humboldt Park near a park lavatory. Three women were seen there, one of whom was taller than the other two, and two men. The taller woman, later identified as defendant, was seen entering the ladies washroom with one of the men. A noise that sounded like a firecracker was heard, and the taller woman emerged from the washroom alone. The two shorter women were seen walking with the second man. One went behind the man. A flash was seen behind the second man, and he fell to the ground. The two shorter women ran, the taller one kicked the body and ran in the direction of the other two.

Chicago police detective John Dolan, at Humboldt Park during the early morning hours of May 12, 1992, observed the bodies of Jimmy Cruz on the sidewalk and Hector Reyes in the washroom. Next to the body of Cruz he found a .25-caliber automatic shell casing. He also recovered a bullet near Reyes.

On May 11, 1992, at 11 p.m., defendant and two other girls, "Mauri," and "Tuti," all members of the Disciples street gang, were seen in a white car by Yvette Rodriguez. She declined to go with them to do a "hit." At 1 a.m., Rodriguez saw the same three young women again, who told her that they had shot the guys. Defendant said that she shot one in the head and back, pointing to the back of her head.

Later that day, Rodriguez was arrested for possession of a controlled substance; she had been arrested earlier on a drug charge, which was still pending. While at the police station, Rodriguez claimed that she knew about the double murder. She drove around with the police looking for defendant, Mauri and Tuti. The next day she went with the police to a funeral home in an undercover van. She pointed out defendant and Mauri at the funeral, both of whom were arrested.

Detective Halvorsen testified that on May 13, 1992, at about 8 p.m., he was in an unmarked car at a funeral home in the area of Armitage and Kimball. He had the names of Loca D, whom he identified as defendant, and Mauri and Tuti. All three were members of the Maniac Latin Disciples (MLD). The funeral was for a member of the MLD who had been killed a few days earlier. The witness pointed out defendant and Mauri, and both were arrested. Halvorsen testified concerning the taking of the statements from defendant, consistent with his testimony at the hearing on the motion to suppress. Halvorsen identified defendant in court as the person who made the statements. ASA Dillon also testified as he did at the hearing, reading to the jury defendant's signed statement as transcribed by the court reporter. In the statement defendant confessed to shooting Reyes in the lavatory and to giving the gun to Mauri, who then shot Cruz on the sidewalk.

Following the introduction of related evidence, the State rested. The court denied defendant's motion for a directed verdict.

Defendant's mother testified on her behalf as she did at the suppression hearing.

Defendant testified for the defense. Her nickname in the MLD was Loca D, which meant Crazy Disciple. She used marijuana, T-sticks, cocaine, and acid, and was hospitalized for an overdose in 1987. She also drank alcohol. Defendant was with Marilyn Mulero (Mauri) getting high on May 11, 1992, at 5 or 6 p.m., when they met Rodriguez. They joined her in her car and drove around, stopping to buy drugs, and got high at about 7 p.m. Tuti joined them. Defendant took five tabs of acid and began to hallucinate. The next thing she remembered was seeing a gun at Humboldt Park. While they were driving around, they had seen Cruz and Reyes in a car. There was no plan. Cruz asked if they wanted to get high with him, and they followed him to Humboldt Park. Defendant denied going into the washroom with Reyes, contending instead that Rodriguez did so. She opened the door and saw Rodriguez shoot Reyes. Rodriguez pointed the gun at her and told her she had not seen or heard anything. Rodriguez then shot Cruz in the back of the head.

When defendant went to a funeral the next day, she was arrested. She had been drinking alcohol and smoking marijuana. She had also used cocaine and T-sticks, and drunk hard liquor. She remembered being shown her statement, transcribed by the court reporter at the police station, but did not remember signing it. The police made her confess, and her statement was not the truth. She misspelled her own name 11 times because she was high. The police did not beat her up or strike her. She received food, soda, and cigarettes. She confessed because she was scared and tricked by the police. The defense rested.

The jury found defendant guilty of the murders of Cruz and Reyes. She was sentenced to the mandated term of natural life in the custody of the Illinois Department of Corrections. She appeals.

Defendant first asserts that the circuit court erred in denying her motion to suppress her confession where the evidence shows that she was denied access to a concerned adult. She argues that failing to have either a youth officer or a parent present is material to determining the voluntariness of her statement since she was a minor.

The facts in this case make it abundantly clear that defendant had undergone police questioning and confessed prior to seeing either a youth officer or her mother. Later, other police interviews were undertaken even while the mother was at the police station asking to see her 15-year-old daughter, but was kept from her. It is not a sufficient answer to say that since defendant later was tried as an adult, meaningful notice need not have been given and consequential protections need not have been afforded her.

The investigating officer, Detective Halvorsen, testified defendant arrived at Area Five at 9:30 p.m. He asked others to notify her mother between 9:30 and 10 p.m. One youth officer on duty was busy; he made no effort to recontact her. The Area Five youth sergeant told him no one else was then accessible and that the first person available after midnight would be assigned. Nevertheless, Halvorsen began interrogating defendant minutes later, at 10 p.m.

Detective Halvorsen requested the 14th District to send a squad car to defendant's home, which was in that district. He did not pursue his request and did not personally know if it had been followed. At midnight, Halvorsen's partner, Detective Renaldo Guevara, told him that defendant's mother had been "contacted." The police subjected defendant to the same routine questioning as they would have a criminal suspect without special regard for age or parental preconfession counselling. The youth division was contacted, yet no youth officer conferred with her prior to police interrogation. She had already given one statement to Halvorsen before the youth officer saw

her for the first time at 12:30 a.m. Courts must be particularly careful in cases involving juveniles because "the coerciveness of a situation is thereby enhanced." *People v. Cole* (1988), 168 Ill. App. 3d 172, 179, 522 N.E.2d 635, *appeal denied* (1988), 122 Ill. 2d 582; *cert. denied sub nom. Holman v. Illinois* (1989), 489 U.S. 1021, 103 L. Ed. 2d 203, 109 S. Ct. 1143.

The facts in this case demonstrate the danger of cursory application of principles to facts. What "reasonable notice" was given here? Sandra Lorenzi, defendant's mother, testified that the police came to her home at about 10 p.m. They first told Ms. Lorenzi her daughter had witnessed a murder. Later in this conversation, they told her the daughter was involved in a murder. Without contradiction, Ms. Lorenzi testified to the following: she immediately told the police she wanted to go to the station. The police told Ms. Lorenzi not to come and that they would call her when it was time for her to come. The call from police never came. At 2 a.m., when Ms. Lorenzi became desperate, she went to the station on her own. The fact that the police told Ms. Lorenzi not to come and did not threaten her if she did come does not change that fact that the police psychologically and effectively prevented Ms. Lorenzi's visit to her daughter until after all the questioning was completed and the confession was taken.

It takes little mental effort to understand the reluctance of a parent to disregard a police directive, to stay at home until police called her. To say that this evidence clearly establishes that the police made a "good faith" effort after defendant was arrested when they notified defendant's mother of her arrest makes a mockery of the concept of "reasonable notice." "Notice" here must be understood to have some purpose, namely, to allow, where possible, the concerned adult to confer and counsel with the juvenile *before* interrogation and confession. Yes, an attempt was made to contact a youth officer before the statement was taken; but the interrogation went forward anyway, within minutes. And yes, the parent here was "notified," but in the same breath she was told she could not see her child until called. These circumstances demonstrate the intended fulfillment of notice here was simply a tragic charade. See generally *People v. McGhee* (1987), 154 Ill. App. 3d 232, 507 N.E.2d 33.

As previously mentioned, Ms. Lorenzi testified that by 2 a.m. she was desperate, and although the police had not contacted her as promised, she nevertheless went to the police station, spoke to the desk sergeant, and was again told to wait. Instead, she went to an upstairs area of the station and spoke to a Spanish-speaking detective who had come to her house. He also told her to wait downstairs. She waited in the station for another hour and one-half. Nobody

contacted her. She went upstairs again. The same Spanish-speaking detective told her to "get the hell out" of there because they were talking to defendant. Several times more she unsuccessfully tried to see her daughter. Eventually, at 8:30 a.m., long past any opportunity for counselling, she was allowed a visit.

According to the record, defendant's court reporter statement was taken at 5:15 a.m. She signed it at 6:15 a.m. Ms. Lorenzi was at the station trying unsuccessfully to see her daughter while investigative questioning was proceeding and the statement was taken. The State chose not to call the desk sergeant to testify in contradiction, nor the Spanish-speaking detective to whom she had spoken. No one who was even potentially in a position to contradict Ms. Lorenzi testified for the State in this aspect of the case.

Detective Halvorsen, who was constantly with defendant; youth officer Pulia, who was with defendant most of the time from 12:30 a.m. on; and ASA Dillon, who was with defendant from about 1:15 a.m. on, did testify. They, however, were in no position to contradict Ms. Lorenzi because they claimed they were not "aware" she was present at Area 5 headquarters. The circuit judge correctly found that defendant's mother arrived sometime after the arrest; the judge erroneously found, however, that the officers testified that at no time did she ask to see her daughter. In fact, no officer testified that Ms. Lorenzi did not ask to see her daughter; rather, they claimed that they were not "aware" of her request. On almost identical facts, Justice Charles Freeman, now an Illinois Supreme Court justice, but then writing for a unanimous appellate court, explained in *People v. Brown* (1989), 182 Ill. App. 3d 1046, 1053-54, 538 N.E.2d 909:

> "Brown's mother testified that she arrived at Area 6 late in the evening, around 7 o'clock on December 23. It is a reasonable inference from the testimony of the State's witnesses that they were not aware of her presence at Area 6 until they ended their interrogation of Brown at about 8:30 p.m. However, the fact that the assistant State's Attorney and police officers who were questioning Brown did not know of his mother's presence at Area 6 is insufficient to avoid the obligation to allow a parent to see his or her child where, as here, the parent has indicated an interest by her presence at the police station. Under such circumstances, *the officers who know of the parent's presence have an affirmative duty to inform those actually questioning a juvenile of the parent's presence and request to see her child. And, in order to ensure the true voluntariness of a statement, those actually questioning the juvenile have an affirmative duty to stop the questioning and allow the parent to confer with her child.*" (Emphasis added.)

Clearly, the alleged "notice" given here was vacuous. Defendant's statements were made before she had an opportunity to confer, prior to questioning, with an adult demonstratively interested in her welfare, her mother, who was present at the station for over six hours. Such failure is "material to determining the voluntariness of [a minor] defendant's statement." *People v. Knox* (1989), 186 Ill. App. 3d 808, 815, 542 N.E.2d 910 (*Knox*); *People v. R.B.* (1992), 232 Ill. App. 3d 583, 594, 597 N.E.2d 879.

In *Knox*, defendant's convictions were reversed because the confession should have been suppressed on his motion. There, Knox, also age 15, was arrested at his home at 9:15 p.m. His father was then at home and he was told he could accompany his son to the station, but the father could not because he was caring for his other younger children. Defendant arrived at the station at 9:30 p.m. As in the present case, the arresting officer notified the police youth division of Knox's presence between 9:45 and 10 p.m., but no youth officer appeared. As also asserted in the instant case, Knox was advised of his rights and stated he understood them. Starting about 9:45 p.m., Knox had a 45-minute interview with the police, during which he admitted his involvement in the crime. An assistant State's Attorney was notified. At 1:45 a.m., the assistant State's Attorney again advised Knox of his rights. Knox repeated his confession. His statement was reduced to writing and was read and signed by Knox at 2:21 a.m., after Knox made and initialed corrections in the statement, read it once to himself and again when it was read aloud to him by the assistant State's Attorney. *Knox*, 186 Ill. App. 3d at 809-13.

Knox's mother testified that she was not home when the police came. When she arrived home at 9:40 p.m., she learned her son had been arrested and went to the station, arriving there at about 10:10 p.m. She identified herself at the desk and was told to wait. At 12 p.m., a detective told her that her son had already confessed, that an assistant State's Attorney would have to be called, and that she might as well go home. *Knox*, 186 Ill. App. 3d at 811.

In *Knox*, both the parents and the youth division were notified of Knox's arrest and presence in the station. The appellate court found the fact that neither was actually present during defendant's confession required suppression, first, because Knox's father's opportunity to accompany his son was an "empty" one due to his responsibility for the other children (*Knox*, 186 Ill. App. 3d at 813) and, second, uncontradicted testimony given by his mother established that "the police contributed significantly to eliminating any opportunity defendant had from speaking to his mother at the police station." (*Knox*, 186 Ill. App. 3d at 813-14.) Considering this evidence, the court stated:

> "We do not believe such conduct by police is consistent with the great care required where a juvenile's incriminating statement is received. *At worst, the police purposely precluded defendant's mother from contact with defendant by neglecting to see if defendant's mother had arrived until after such time as defendant had completed his confession.* At best, the police simply subjected defendant to the same routine questioning of a criminal suspect without special regard for his youth. Either scenario is impermissible and casts some doubt over the voluntariness of defendant's statement." (Emphasis added.) (*Knox*, 186 Ill. App. 3d at 814.)

The same conclusion is compelled by consideration of the evidence in the instant case.

Here, the ongoing interrogation was part of a pattern of police attempts to question the minor without prior parental counselling. This pattern of conduct started when the police, already interrogating defendant, told the mother not to come to the station; the pattern continued when the mother, desperate to see her daughter, nevertheless came, only to be obstructed from communicating with her daughter until after statements were made, reduced to writing, and signed.

Juveniles possess the same constitutional privilege against self-incrimination as adults; and when juveniles are unaided by counsel, great care "must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." (*In re Gault* (1967), 387 U.S. 1, 55, 18 L. Ed. 2d 527, 561, 87 S. Ct. 1428, 1458.) Further, special care must be taken in scrutinizing the record where a juvenile is involved, since juveniles could be "easy victim[s] of the law." *Haley v. Ohio* (1948), 332 U.S. 596, 599, 92 L. Ed. 224, 228, 68 S. Ct. 302, 303-04; *People v. Travis* (1984), 122 Ill. App. 3d 671, 674, 462 N.E.2d 654.

In another factual setting similar to the present case, *People v. R.B.* (1992), 232 Ill. App. 3d 583, 592-93, 597 N.E.2d 879, the appellate court held:

> "Juvenile confessions are to be carefully reviewed to ensure that they are voluntary and not coerced, suggested, or the product of a juvenile's ignorance of rights, his adolescent fantasy, fright or despair. (*People v. Holcomb* (1989), 192 Ill. App. 3d 158, 548 N.E.2d 613; *People v. Racanelli* (1985), 132 Ill. App. 3d 124, 476 N.E.2d 1179.) The test is whether, under the totality of the circumstances, the statement was made freely, without compulsion or inducement of any sort (*Haynes v. Washington* (1963), 373 U.S. 503, 10 L. Ed. 2d 513, 83 S. Ct. 1336), with consideration given to the characteristics of the accused and the details of the interrogation. (*Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041.) Considering the totality of the circumstances, *and*

particularly the absence of a youth officer or parent prior to incrimination, we conclude that the trial court improperly denied defendant's motion to suppress his statement and quash arrest.

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This court has stated that the failure to telephone a juvenile defendant's parents, or the absence of a parent during questioning, is a factor in determining voluntariness, but is not determinative of whether defendant's confession should be suppressed. (*People v. Stachelek* (1986), 145 Ill. App. 3d 391, 495 N.E.2d 984; *In re J.S.* (1984), 121 Ill. App. 3d 927, 460 N.E.2d 412.) However, *where the State failed to take appropriate steps to ensure that a juvenile defendant had an opportunity to confer with an interested adult, either a parent or a youth officer, this court has held that the police conduct rendered his confession inadmissible. People v. Knox* (1989), 186 Ill. App. 3d 808, 542 N.E.2d 910." (Emphasis added.)

In *In re J.O.* (1992), 231 Ill. App. 3d 853, 855, 596 N.E.2d 1285, yet another case involving similar facts, the appellate court held:

"A juvenile's age and the fact that the interrogation occurred in the middle of the night may properly be considered in evaluating the voluntary nature of a confession. (*Haley v. Ohio* (1948), 332 U.S. 596, 92 L. Ed. 224, 68 S. Ct. 302.) *Additionally, if parents have indicated an interest by their presence, then they should be allowed to confer with their children before any questioning begins, as well as be present when any questioning occurs.* (*In re S.D.S.* (1982), 103 Ill. App. 3d 1008, 431 N.E.2d 759.) The presence or absence of a parent is a factor in evaluating the voluntary nature of a confession under the totality of the circumstances test. *In re S.D.S.* (1982), 103 Ill. App. 3d 1008, 431 N.E.2d 759." (Emphasis added.)

In the case *sub judice*, not only was defendant interrogated before having an opportunity to confer with a concerned adult but, worse, any opportunity to do so was effectively frustrated by police. This factor is "material" in determining the voluntariness of defendant's statement. (*Knox*, 186 Ill. App. 3d at 815; *R.B.*, 232 Ill. App. 3d at 594.) In *Knox*, the court concluded:

"Here, however, the failure to have a juvenile officer present is material to determining the voluntariness of defendant's statement. *That failure, in view of the failure to permit defendant's mother an opportunity to see her son at the police station, deprived defendant of his only chance to consult with any adult interested in his welfare prior to making a statement.* Such is not the type of sensitivity to be accorded to receipt of a minor's statement.

We therefore reverse defendant's convictions and remand the matter for a new trial." (Emphasis added.) *Knox*, 186 Ill. App. 3d at 815-16.

The same result is required in the instant case. The dissent mischaracterizes our decision by charging that we apply a *per se* rule instead of a totality of the circumstances test in determining the voluntariness of defendant's confession. Our decision, however, is not based solely on the fact that defendant was interrogated without the opportunity to confer with a concerned adult. Here, a juvenile defendant, age 15, was interrogated throughout the night as part of a pattern of police conduct designed to elicit a confession, as well as to obstruct parental counselling. Under all these circumstances, the confession was not voluntary. That defendant was tried as an adult is after the material fact.

Notwithstanding the strong evidence of defendant's guilt in this case, reversal is mandated on principle and a new trial is ordered for reasons set forth above.

Since this case must be retried, other assignments of alleged trial error need not be considered here.

Reversed and remanded for a new trial.

McCORMICK, J., concurs.

JUSTICE DiVITO, dissenting:

The majority judgment in this case cannot be reconciled with well-established Illinois law. I therefore respectfully dissent.

The majority errs because (1) it ignores the standard that a trial judge's ruling on a motion to suppress a confession should not be reversed unless it is contrary to the manifest weight of the evidence, and (2) it ignores the standard that the voluntariness of a confession is determined by the totality of the circumstances and that not having either a parent or a youth officer present for a juvenile's confession is merely a consideration which does not automatically render that confession inadmissible.

I. STANDARD OF REVIEW

"The established standard of review of a trial court's finding on a question of the voluntariness of a confession is whether the finding is contrary to the manifest weight of the evidence." (*People v. Melock* (1992), 149 Ill. 2d 423, 448, 599 N.E.2d 941, 951.) Our supreme court has repeatedly stated that "[t]he finding of the trial court on the voluntariness of a confession will not be disturbed unless it can be said

that it is contrary to the manifest weight of the evidence." (*People v. Davis* (1983), 97 Ill. 2d 1, 20, 452 N.E.2d 525, 534.) This standard of review applies to a trial court's ruling concerning the admissibility of a juvenile's confession as well. *In re Lamb* (1975), 61 Ill. 2d 383, 388, 336 N.E.2d 753, 756, *cert. denied* (1976), 425 U.S. 938, 48 L. Ed. 2d 180, 96 S. Ct. 1672.

The majority pays no heed to this standard; indeed, it totally ignores it despite its significant application in both *People v. Brown* (1989), 182 Ill. App. 3d 1046, 538 N.E.2d 909, and *In re J.O.* (1992), 231 Ill. App. 3d 853, 596 N.E.2d 1285, cases upon which it relies and which are discussed below.

The classic explanation of the application of the standard, repeated numerous times by our courts, is provided in *In re Application of County Collector* (1978), 59 Ill. App. 3d 494, 375 N.E.2d 553:

> "In order for a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Application of County Collector*, 59 Ill. App. 3d at 499, 375 N.E.2d at 557.

Application of this standard in this case would have mandated affirmance, for it cannot be said that a conclusion opposite that drawn by the trial judge is clearly apparent. As will be demonstrated below, the trial judge's ruling was correct and the *per se* rule applied by the majority is inconsistent with precedent and unjustified by Illinois law.

II. TOTALITY OF CIRCUMSTANCES STANDARD

Our supreme court has stated that "this court has long looked to the 'totality of the circumstances' to determine the voluntariness of any confession." (*People v. Prude* (1977), 66 Ill. 2d 470, 475, 363 N.E.2d 371, 373, *cert. denied* (1977), 434 U.S. 930, 54 L. Ed. 2d 291, 98 S. Ct. 418.) It has stated that "[t]he determination of the question whether or not a confession is [voluntarily given] depends not on any one factor, but upon the totality of all the relevant circumstances." (*People v. Johnson* (1970), 44 Ill. 2d 463, 468, 256 N.E.2d 343, 347, *cert. denied* (1970), 400 U.S. 958, 27 L. Ed. 2d 266, 91 S. Ct. 356.) This standard applies to statements of juveniles as well as to those of adults. *Prude*, 66 Ill. 2d at 468, 363 N.E.2d at 373; *In re Lamb*, 61 Ill. 2d at 388, 336 N.E.2d at 756.

Every Illinois court that has addressed the issue (*Knox*, discussed below, being the single exception because it does not address the issue) has applied the totality of the circumstances test and rejected the *per se* rule regarding a minor's opportunity to consult with a parent or other person before being questioned: *In re Stiff* (1975), 32 Ill. App. 3d 971, 978, 336 N.E.2d 619, 625 (citing supreme court "totality of circumstances" test, explicitly rejected invitation to adopt *per se* rule when parent is not notified and juvenile is not taken to youth officer); *In re Bertrand* (1978), 65 Ill. App. 3d 703, 705, 382 N.E.2d 660, 662 (totality of circumstances test applied to affirm admission of juvenile's admission to two armed robberies before any effort was made to contact juvenile's parents or youth officer); *People v. Baxtrom* (1980), 81 Ill. App. 3d 653, 660-61, 402 N.E.2d 327, 332 (totality of circumstances test applied; even violation of Juvenile Court Act would not render statement inadmissible); *In re S.D.S.* (1982), 103 Ill. App. 3d 1008, 1012, 431 N.E.2d 759, 762, *cert. denied* (1982), 459 U.S. 869, 74 L. Ed. 2d 128, 103 S. Ct. 153 (*per se* rule not to be followed; voluntariness of confession to be gleaned from totality of circumstances); *In re J.S.* (1984), 121 Ill. App. 3d 927, 936-37, 460 N.E.2d 412, 418-19 (totality of circumstances test applied; failure to notify parent and youth officer merely a consideration in determining voluntariness; juvenile's confession properly admitted); *People v. Clements* (1985), 135 Ill. App. 3d 1001, 1007-08, 482 N.E.2d 675, 680, *cert. denied* (1986), 476 U.S. 1106, 90 L. Ed. 2d 361, 106 S. Ct. 1952 (totality of circumstances test applied; failure to notify guardian of juvenile with below average IQ did not render confession inadmissible); *People v. Stachelek* (1986), 145 Ill. App. 3d 391, 402-03, 495 N.E.2d 984, 990-91 (totality of circumstances test applied; failure to notify parents did not render statements of juvenile inadmissible; statute "is not meant to immunize minors from police investigation and interrogation"); *People v. Holcomb* (1989), 192 Ill. App. 3d 158, 171-72, 548 N.E.2d 613, 623-24 (unavailability of youth officer does not prevent police from interviewing juvenile, for police have a duty to investigate crimes even where juveniles are involved).

In *People v. Bobe* (1992), 227 Ill. App. 3d 681, 592 N.E.2d 301, *appeal denied* (1992), 146 Ill. 2d 634, 602 N.E.2d 459, the court held that the statement of a 16-year-old defendant was voluntary, even though the defendant's father and another testified, without contradiction, that his father was not permitted to see him, a juvenile officer was not present during all interviews, and the defendant was handcuffed, unfed, and alone in a room for several hours. *Bobe*, 227 Ill. App. 3d at 705, 592 N.E.2d at 316.

Although some courts have held that the statutory requirement that a parent or a youth officer be notified does not apply when a juvenile is charged as an adult, because the juvenile is not subject to the jurisdiction of the juvenile court but to that of the criminal court (*People v. Sevier* (1992), 230 Ill. App. 3d 1071, 1084, 598 N.E.2d 968, 978; *People v. Green* (1988), 179 Ill. App. 3d 1, 13, 535 N.E.2d 413,

420, *appeal denied* (1989), 127 Ill. 2d 627, 545 N.E.2d 120; *People v. Visnack* (1985), 135 Ill. App. 3d 113, 126, 481 N.E.2d 744, 753), most courts addressing the issue, as indicated in the preceding two paragraphs, hold that failure to comply with the statutory requirement is merely a consideration in determining admissibility of a juvenile's statements in *either* juvenile or adult proceedings. The majority's decision here is not defensible under either line of cases.

In *People v. Zepeda* (1970), 47 Ill. 2d 23, 265 N.E.2d 647, in construing the section of the Juvenile Court Act requiring parental notification and surrender of the minor defendant to a juvenile officer, our supreme court held that the juvenile defendant's statements in that case were properly admitted despite being taken out of the presence of parents and a juvenile officer. The court held that because the statements of the juvenile had been voluntarily given and with due regard for his constitutional rights, "even if it be assumed that there was a failure to reasonably comply with [the relevant statute] and that such failure caused defendant to be unlawfully detained," those facts would not in themselves invalidate a confession. *Zepeda*, 47 Ill. 2d at 27, 265 N.E.2d at 649.

In *People v. Steptore* (1972), 51 Ill. 2d 208, 281 N.E.2d 642, the police concededly did not comply with Juvenile Court Act provisions that required notice to a parent and surrender to a juvenile officer. Nevertheless, our supreme court held that because the juvenile defendant was told of his rights to silence and to have counsel present and he understood them, "[u]nder the circumstances failure to comply with [the relevant statute] did not render the statement inadmissible." *Steptore*, 51 Ill. 2d at 214-15, 281 N.E.2d at 645.

Illinois' rejection of the *per se* rule is understandable. Although a requested attorney must be present for custodial questioning, there is no requirement—constitutional, statutory, or case law—that a parent or youth officer be present for questioning of a minor. The statute in question here[1] requires only the *notification* of a parent or guardian and that the minor be taken to a youth officer. As our supreme court said in *Zepeda*, "Nothing in [the statute], or in any other provision of the [Juvenile Court] Act, imposes sanctions for a failure to comply and, under the rule long adhered to by this court, unlawful detention will not, of itself, invalidate a confession or statement of an accused." (*Zepeda*, 47 Ill. 2d at 27, 265 N.E.2d at 649.) It is thus not surprising that the well-established standard in Illinois is that any violation of the statute is merely a consideration in weighing the totality of circumstances.

[1]The relevant statute reads as follows:

"A law enforcement officer who takes a minor into custody without a warrant *** shall, if the minor is not released, immediately make a reasonable attempt to notify the parent or other person legally responsible for the minor's care or the person with whom the minor resides that the minor has been taken into custody and where the minor is being held; and the law enforcement officer shall without unnecessary delay take the minor to the nearest juvenile police officer designated for such purposes in the county of venue or shall surrender the minor to a juvenile police officer in the city or village where the offense is alleged to have been committed." 705 ILCS 405/5—6(2) (West 1992).

Interestingly, the majority does not say it is applying a *per se* rule.[2] Instead, quoting *Knox*, it twice says that the alleged refusal to allow defendant's mother to see defendant was "material" in determining the voluntariness of defendant's statement. (273 Ill. App. 3d at 852, 854.) If "material" is code for *per se*, the majority's judgment, though incorrect, is at least logical. If "material" is merely descriptive of the kind of "consideration" the evidence merits, the majority's conclusion cannot be justified.

In reaching its judgment, the majority ignores every case cited in this section. More important, it ignores the well-established principles supplied by those cases. Inexplicably, it also ignores the fact that even defense counsel, while arguing for suppression of the confession before the trial judge, invoked the totality of circumstances test and conceded that the absence of defendant's mother and a youth officer was only a factor to be considered.

III. DETERMINATION OF VOLUNTARINESS IN THIS CASE

(a) The Evidence

The evidence is critical in applying the correct standards to a case such as this. For that reason, a summary of the relevant

[2]In response to this dissent, the majority specifically denies applying a *per se* rule. (273 Ill. App. 3d at 855.) For the first time in its analysis, and only in connection with this denial, does the majority concede the existence of the standard of the "totality of the circumstances test in determining the voluntariness of defendant's confession." (273 Ill. App. 3d at 855.) The majority's additional basis for finding the statements involuntary (that defendant "was interrogated throughout the night as part of a pattern of police conduct designed to elicit a confession") (273 Ill. App. 3d at 855) is not supported by the record and is contrary to the trial judge's findings. Indeed, that basis represents nothing more than the *per se* rule bolstered by conclusional statements designed to comply with the totality of circumstances test.

testimony at the suppression hearing and at trial follows. *People v. King* (1986), 109 Ill. 2d 514, 525, 488 N.E.2d 949, 955, *cert. denied* (1986), 479 U.S. 872, 93 L. Ed. 2d 173, 107 S. Ct. 249 (on review, evidence presented at trial may be considered in addition to evidence presented at suppression hearing).

At the suppression hearing, four witnesses testified: Detective Ernest Halvorsen, youth officer Robert Pulia, and Assistant State's Attorney John Dillon for the State; and Sandra Lorenzi, defendant's mother, for defendant.

Detective Halvorsen testified that he contacted the 14th District and requested that a beat car go to the home of defendant's mother to tell her that defendant was at Area 5. Each of the State's witnesses testified that he or she had been informed that defendant's mother had been notified of defendant's arrest. Detective Halvorsen testified that between 9:30 and 10 p.m. he learned that the youth officer from the 25th District was otherwise occupied and that an Area 5 youth officer would not be available until midnight. Defendant was not handcuffed. The State's witnesses testified that defendant was sober and coherent, did not appear under the influence of drugs or alcohol, did not smell of drugs or alcohol, understood questions, and was responsive to them. Each of the three State witnesses, at various times, gave defendant *Miranda* warnings at least once; on each occasion defendant said she understood her rights. She was given cigarettes. She asked for and was given a soda; later she asked for and was given food. She privately told the assistant State's Attorney that "she had been treated well and she had no complaints." The youth officer was present for all of defendant's interrogations except the first. Detective Halvorsen was never told that defendant's mother wanted to see defendant; when they were in the open area of the police station, none of the three State witnesses was aware of anyone desiring to see defendant.

Defendant gave Detectives Halvorsen and Renaldo Guevara an oral statement, which lasted 20 to 30 minutes, starting at about 10 p.m.; she gave the assistant State's Attorney an oral statement, which lasted 20 to 30 minutes, starting at about 1:15 a.m.; she gave the statement to the court reporter, which lasted about 10 minutes, starting at about 5:15 a.m.; and she read, corrected, and signed each page of the transcribed statement, which was 11 pages long, starting at about 6:20 a.m. The assistant State's Attorney had her read the first portion of her statement aloud to satisfy himself that she could read English. Sitting next to her, he then read it aloud as she followed along. During this time she made corrections on the statement, initialled the corrections, and signed each page. This process took approximately 15 to 20 minutes. A photograph taken of defendant immediately after she signed the statement, showing her "with a big smile," was signed by her and admitted into evidence.

In her statement to the court reporter, defendant was advised of her *Miranda* rights and waived them. She said she had been treated well by the police and the assistant State's Attorney, had not been promised anything, had not been threatened in any way, and had been given food and cigarettes. She said that she was a member of the Maniac Latin Disciples street gang. On the day of the killings, she met with fellow female gang members "Muneca" and "Tuti" to plan "a mission" to get revenge for the killing of "Mudo," a fellow male gang member who had been killed by the Latin Kings, an enemy gang, a couple of days before. She had a .25-caliber automatic. They drove in the car of "Rabbit," the brother of Muneca, to the area of the Latin Kings. They looked for Latin Kings and finally met Jimmy Cruz, whom she knew, and Hector Reyes, whom she had met previously. They were Latin Kings. They were in another car and agreed to meet in Humboldt Park "to catch a buzz." At the park, they left their cars and walked. She walked with Cruz until they arrived at a washroom. Reyes said he needed to use the washroom, and she walked in with him. They kissed in the washroom for a couple of minutes. When Reyes turned his back to use the toilet, she shot him in the back of the head. After leaving the washroom, she gave the gun to Muneca. Tuti, who was walking hand in hand with Cruz, gave Muneca a signal, and Muneca went up to Cruz and shot him in the back of the head. Defendant "[s]howed [her] respect" for Cruz and then drove with her friends to her gang's area. There she told her fellow gang members what they had done and they celebrated with marijuana and beer.

Detective Anthony Riccio testified at trial that at about 9 a.m. he took defendant from the interview room. When she saw television cameras outside the room, defendant said, "What is up with these cameras?" She then said "Disciple thing" and gave the sign of the Maniac Latin Disciples, a pitchfork in an upright position. As she entered an office, she said "Maniac" and then "K.K.," which meant "King Killer." Riccio testified that defendant was sober, alert, and able to understand directions "completely." A videotape showing defendant, her actions, and her words was then played for the jury.

Defendant's mother testified that two plainclothes detectives came to her home at about 10 or 10:15 p.m. One of them was a "Spanish guy." They "pounded" on the door and "came with some guns in their hands." They scared her and her baby and told them to go into another room because "they needed to talk to [her] husband" for

whom they specifically asked by asking him if he was William Burrell. They told him that his daughter called him. When she heard her daughter's name she came out of the other room and said, "no it wasn't like that." The officer said that her daughter had seen a murder and "[t]hat he had her in custody, whatever, protective custody." He gave her the correct address of the place where she was in custody. The officer then told her that defendant "had called the house and that she seen the murder, and it was a lie because she talked to me." The officer then told her that defendant was in custody; she was involved in a murder. At the hearing, she testified the police were there about an hour and left "[a]bout 11, 12"; at trial she testified the police were there "maybe an hour, an hour and a half" and left at "maybe eleven, 11:15."

Defendant's mother then testified that she waited at home because the police had told her not to go to the police station and that they would call her when she could go. Though she received no call, she went to the police station with a girlfriend at about 2 a.m. About 10 minutes after arriving, she went upstairs and was told by the same Spanish officer who had been to her home that she "couldn't go in there." She went downstairs for about 1½ hours, and at "[a]bout 3:00, 3:15" (she had her watch on so she knew the time), the same officer told her "that I had to get the hell out of there because they were talking to her." She finally saw her daughter at 8:30 a.m. At first her daughter did not know who she was. Her daughter was gagging and she could not understand her. She could understand her speech "[v]ery little, very little." Her daughter's face and eyes "were all pushed out like she would have been high." She believed her daughter had been on drugs or alcohol that morning.

On cross-examination, defendant's mother testified that defendant did not live at home. She was living in a foster home, but she was a runaway from that home at the time. As for the girlfriend who accompanied her to the police station, "[s]he got beat up with the gangs so she left town" and she had not talked to her for about five months. At trial, when shown the photograph taken of her daughter immediately after the statement to the court reporter, she said her daughter looked worse than she did in the picture, "[h]er hair was all messed up and everything." Nevertheless, she testified, "[y]ou can tell she was high there too, but not that much."

(b) Cases Cited by the Majority

Except for a single aberration, the cases cited by the majority directly support the opposite conclusion or are distinguishable.

In *People v. Brown* (1989), 182 Ill. App. 3d 1046, 538 N.E.2d 909 (273 Ill. App. 3d at 851), for example, the appeal was brought by the State following the granting of a motion to suppress in the circuit court. While the majority correctly quotes from the decision (273 Ill. App. 3d at 851), immediately following the quoted portion the appellate court states that the failure to advise a concerned adult was merely a *consideration* in evaluating the voluntariness of a juvenile's statement or confession. Using the defendant's inability to confer with his mother as a consideration, *combined with* the failure of the police to advise the defendant of his *Miranda* rights, the court concluded that the trial judge's finding that the statement was coerced was not against the manifest weight of the evidence. *Brown*, quoted by the majority solely for its out-of-context language, thus does what the majority fails to do: it utilizes the proper standard of review and applies the totality of circumstances test. Proper application of *Brown* would have supported affirmance of the trial judge's ruling here, for it too was not against the manifest weight of the evidence.

The majority says *People v. R.B.* (1992), 232 Ill. App. 3d 583, 597 N.E.2d 879 (273 Ill. App. 3d at 853-54), presents "another factual setting similar to the present case." (273 Ill. App. 3d at 853.) It neglects to point out, however, that there the appellate court concluded that the defendant had been arrested without probable cause. In considering whether sufficient attenuation existed to purge the defendant's statement from the taint of his illegal seizure, the court concluded that the evidence did not show that the defendant waived his *Miranda* rights. The court's discussion of the failure of the police to contact a parent or a youth officer was connected to the attenuation issue and in the context of a juvenile having been *illegally* arrested. The instant case bears no resemblance to *R.B.*

In re J.O. (1992), 231 Ill. App. 3d 853, 596 N.E.2d 1285 (273 Ill. App. 3d at 854), is another case in which the State appealed the circuit court's suppression order. On appeal, the State contended that the circuit court had erred in suppressing the juvenile's confession solely because his parents had been denied the right to see him; the State thus argued that the circuit court had erred by applying a *per se* rule. The appellate court said that "there is no *per se* rule that juveniles must be allowed to consult with their parents prior to questioning." (231 Ill. App. 3d at 854.) The court also stated that "it is well settled that the voluntariness of a juvenile's confession is to be determined by the totality of the circumstances." (*J.O.*, 231 Ill. App. 3d at 854, 596 N.E.2d at 1286-87.) It then evaluated the circuit court's ruling using the totality of the circumstances standard, and concluded that the circuit court had applied a totality of circum-

stances standard and not a *per se* standard and thus affirmed the circuit court's suppression order. Again the majority quotes the appellate court's statement out of context, making it appear to support its position when in fact it does exactly the opposite.

Both *People v. Cole* (1988), 168 Ill. App. 3d 172, 522 N.E.2d 635, *appeal denied* (1988), 122 Ill. 2d 582, 530 N.E.2d 253 (273 Ill. App. 3d at 850), and *People v. McGhee* (1987), 154 Ill. App. 3d 232, 507 N.E.2d 33, *appeal denied* (1987), 116 Ill. 2d 570, 515 N.E.2d 120 (273 Ill. App. 3d at 850), are contrary to the majority's judgment. In *Cole*, the court suppressed a juvenile's confession because of an illegal arrest and recognized that failure to notify a parent or to have a youth officer present was properly considered, "but that a violation of the statute was not a *per se* denial of a juvenile's constitutional rights." (*Cole*, 168 Ill. App. 3d at 181, 522 N.E.2d at 640.) In *McGhee*, the court, in suppressing the confession of a juvenile because of an illegal arrest, applied the totality of circumstances test and said that denying the juvenile's mother the opportunity to see him and not having a youth officer present "does not *per se* constitute a denial of the defendant's rights." *McGhee*, 154 Ill. App. 3d at 236-37, 507 N.E.2d at 35.

People v. Knox (1989), 186 Ill. App. 3d 808, 542 N.E.2d 910, *appeal denied* (1989), 127 Ill. 2d 630, 545 N.E.2d 122, the primary case relied upon by the majority (273 Ill. App. 3d at 852-53, 854-55), is an aberration from the line of cases deciding this issue. In *Knox* a panel of the appellate court reversed the circuit court, without citation to authority regarding its ultimate holding, without considering the manifest weight of the evidence standard of review, and without reference to the principle that the failure to notify a parent or a youth officer is merely one consideration in the evaluation of the voluntariness of a juvenile's statement or confession. Without saying so, the *Knox* court applied a *per se* rule, contrary to every other case addressing this issue. The majority finds this aberrant case persuasive, but it should not be followed.

(c) Application of Correct Standards to This Case

The record in this case discloses that the trial judge applied the correct totality of circumstances test in ruling that defendant's statements were admissible. Our review of the correctness of the judge's ruling, by application of the against the manifest weight of the evidence test, compels affirmance. The fact that defendant's mother was allegedly unable to speak to defendant prior to interrogation is one factor to consider in the totality of the circumstances, as is the fact that a youth officer was not present when defendant gave her first

statement. These factors are overridden, however, by the remainder of the evidence which showed that defendant's confession was freely given, without threats, promises, inducements, or physical coercion. Defendant was given food when she requested it, treated well by the police, and had no complaints about her treatment. She could read and understand English, she understood her written statement, she made corrections to it, and she signed it. She did not appear to the officers, the assistant State's Attorney, or the youth officer to be under the influence of alcohol or other drugs. There was no evidence that she asked to speak to her mother. The clarity of her statements, particularly the detail contained in the statement given to the court reporter, belied the testimony of her mother that she was nearly incomprehensible. The bravado displayed by defendant for the sake of television cameras, a videotape of which was shown to the jury, also belied her mother's testimony and was consistent with the conscious actions of a defiant person who was in control, not those of a youngster in a coercive environment.

The majority relies heavily on the fact that no one was called to rebut the testimony of defendant's mother. Without regard to the inherent difficulties in proving a negative and without regard to the fact that everyone addressing this issue in the circuit court—judge, prosecutor, and defense attorney—applied the totality of circumstances test and saw the noncontact between mother and defendant as only a consideration, the majority places too much reliance on the fact that the evidence was uncontradicted. The circuit court is in a superior position to evaluate a witness' credibility when it hears a motion to suppress, and it need not accept the defendant's version of the circumstances in preference to another version. *People v. Cleesen* (1988), 177 Ill. App. 3d 103, 113, 531 N.E.2d 1113, 1119.

Indeed, much of defendant's mother's testimony was incredible. Did the police officers, charged only with the responsibility of notifying the mother of her daughter's whereabouts, really enter her home with drawn guns? Did they refuse to talk to her and insist only on talking to her husband? Did they stay for at least an hour? Why did the police go to her house at all if they did not want her to know that her daughter was in custody and where she could be seen? Did police deny her access to her daughter until 8:30 a.m., even though all statements had been completed by 6:40 a.m.? At 8:30 a.m., after having given a coherent statement to a court reporter and minutes before performing for television cameras, was her daughter gagging, incomprehensible, and unaware?

Although pointing out "the danger of cursory application of principles to facts" (273 Ill. App. 3d at 850), without analysis the

majority suppresses all of defendant's statements, through its broad application of its *per se* rule. In doing so, the majority leaves important questions unanswered. For example, in view of the evidence that the detectives were talking to defendant at about the same time other officers were visiting her mother, can it be said that defendant's first statement was tainted by her mother's allegation that she was told not to go to the police station until she was called? If so, the majority's unarticulated *per se* rule is even broader than it first appears. Also, in view of the fact that defendant had already given her oral statement to the assistant State's Attorney by the time defendant's mother arrived at the police station at 2 a.m., how was that statement tainted by the alleged rebuff of her mother at the police station?

Considering the totality of the circumstances, there is ample evidence in the record to support the trial judge's determination even if it be conceded, for the sake of argument, that defendant's mother was denied access to her. Since the opposite conclusion is not clearly apparent, the ruling of the trial judge on the motion to suppress should be upheld and the judgment in this case should be affirmed.

ROBERT F. SMITH, as Independent Adm'r of the Estate of Barbara A. Smith, Deceased, Plaintiff-Appellant, v. CRAIG T. HARAN *et al.*, Defendants-Appellees.

First District (2nd Division) No. 1—94—0624

Reversed and remanded.

Opinion filed June 27, 1995.—Rehearing denied July 28, 1995.

1. CREDITORS' RIGHTS—*trial court erred in finding that signed instrument discovered in decedent's safe did not contain promise to pay.* Where the independent administrator of decedent's estate brought an action to collect on an instrument he found in decedent's wall safe that was signed by defendants and stated defendants agreed to repay $125,000 to decedent, but defendants claimed that they never transacted business with decedent, the trial court erred in finding that the signed instrument did not contain a promise to pay, since no particular words of promise are required in a promissory note as long as there can be deduced a promise to pay, and the record showed that decedent's name, her address, the heading "Promissory Note,"

the phrases "We collaterize this note of $125,000" and "Note to be paid back within 12 months" and the signatures of the defendants were sufficient to show the signed instrument contained a promise to pay.

2. COMMERCIAL CODE—*when plaintiff should recover on instrument unless defendants establish defense.* Where the instrument which plaintiff found in decedent's safe was made and signed by the defendants and contained the defendants' unconditional promise to pay a sum certain in money at a definite time, the plaintiff should be allowed to recover under the terms of the instrument pursuant to section 3—805 of the Uniform Commercial Code, which applies to any instrument whose terms do not preclude transfer, and the instrument also met the requirements of section 3—307 of the Code, which provides that when signatures on an instrument are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense, and the record showed that the instrument in question did not preclude transfer, the defendants admitted signing the document and the defendants failed to establish a defense.

3. DEAD-MAN'S ACT—*argument that Dead-Man's Act may only be used as shield to protect estate and not as sword to prevent opposing party from presenting defense was without merit.* The defendants' argument that the Dead-Man's Act was intended to be used as a shield to protect estates from fraudulent claims and not as a sword to prevent the opposing party from presenting a legitimate defense was without merit, since the Act specifically states that it pertains to any action in which the representative of the deceased sues or defends and, therefore, the Act contemplates actions where the representative of the deceased sues to protect the interests of the estate.

4. DEAD-MAN'S ACT—*decedent's failure to give defendants money did not qualify as "event" under Dead-Man's Act.* Where the Dead-Man's Act provides for the exclusion of testimony regarding any event that took place in the presence of decedent, defendants argued that their testimony regarding the decedent's failure to give them money should not have been excluded, since this event could not have taken place in the presence of the decedent, but the decedent's failure to give defendants money was not an event under the Dead-Man's Act, since "event" usually refers to an occurrence or a happening and, therefore, defendants' negative testimony about a transaction that did not take place was properly excluded.

5. DEAD-MAN'S ACT—*trial court abused its discretion in barring defendants' testimony regarding dealings with decedent.* Although the Dead-Man's Act states that when a party sues as representative of a deceased person, no person directly interested in the action shall be allowed to testify on his own behalf to any conversation with the deceased to any event which took place in the presence of the deceased, the trial court abused its discretion in barring the defendants' testimony that decedent never gave them any money, since the record showed that the note in question must have been given to the deceased, in that it was found in her safe and, as it was unrealistic to assume that it was given to her without any communication,

APPENDIX B

The Trial Judge's Finding Denying Respondent's Motion to Suppress

THE COURT: Based on what I heard, which consists of the testimony of the police officers, primarily, and the mother of the defendant I think the police exercised a good faith effort after the defendant was arrested when they notified the mother of her incarceration. That is uncontested. The mother even admits that.

The only real issue is whether or not the mother was allowed access to the daughter at the police station. She arrived sometime after the arrest and the officers have testified that at no time did she request to see the defendant.

As far as the alcohol and drug ingestion, which is alleged in the motion on behalf of Ms. Montanez, that is an indication to me she is a little more sophisticated than an average

15-year-old and the only one who can testify as to the effects of the alcohol and drugs as it relates to the voluntary nature of the confession or involuntary nature is the defendant herself as to what effect they had on her.

I certainly don't accept the mother's interpretation of the effect of the alcohol and drugs on the defendant. That has to come from the defendant as tc how severely her will was effected by the ingestion of alcohol and drugs.

Based on the totality of the circumstances I believe that law enforcement acted in good faith, that the statement was given to them and this is no question in my mind that Miranda was given not once but twice.

It is a factual finding that this statement is voluntary and will be used against the defendant at her subsequent trial.

So, Motion Defendant to Suppress Statements denied.

What date?

MR. BERMAN: We are talking about August 4th?

THE COURT: For?

MR. BERMAN: Jury trial at this point.